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DEPARTMENT OF JUSTICE AND FOREIGN CLAIMS SETTLEMENT COMMISSION

of 018

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

ON

DEPARTMENT OF JUSTICE AND FOREIGN CLAIMS SETTLEMENT COMMISSION

FEBRUARY 20, 1986

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DEPARTMENT OF JUSTICE AND FOREIGN CLAIMS SETTLEMENT COMMISSION

THURSDAY, FEBRUARY 20, 1986

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:15 a.m., in room 2226, Rayburn House Office Building, Hon. Dan Glickman (chairman of the subcommittee) presiding.

Present: Representatives Glickman, Frank, Boucher, and Coble.

Staff present: William P. Shattuck and Janet S. Potts, counsel; Jen Ihlo assistant counsel; Kevin C. Richardson, associate counsel; and Florence McGrady, legal assistant.

Mr. GLICKMAN. Good morning.

This morning the subcommittee is holding a hearing on the budget authorization for fiscal year 1987 and oversight relating to the Civil Division relating to the Department of Justice, as well as the Foreign Claims Settlement Commission of the United States, which is a separate agency within the Department.

My review of the authorization request for the Civil Division shows that it has requested an increase in budget. This increase is requested because of the substantial growth of civil litigation faced by the Government both as plaintiff and defendant.

The Foreign Claims Settlement Commission has requested a decrease authorization from fiscal year 1986 because of substantially reduced workload.

I intend to cover a number of issues during this hearing, including the record of the defense procurement fraud unit, the Department's efforts to control fraud among contractors, the hiring of private attorneys to represent Government employees, Department efforts to collect debts owed the Government and other policy matters relating to the operation of the Department of Justice.

Our witnesses will be Mr. Richard K. Willard, Assistant Attorney General of the Civil Division, representing the Justice Department and Mr. Bohdan Futey, Chairman of the Foreign Claims Settlement Commission.

Before I allow the testimony, I am going to swear the witnesses today, but I would like to ask my colleagues if they have any opening statements to make?

Mr. FRANK. No.

Mr. BOUCHER. No.

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Mr. GLICKMAN. If not, Mr. Willard, we welcome you here today and I would ask you to come to the microphone and I will give you an oath which I will ask you to respond.

[Witness sworn.]

STATEMENT OF RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. GLICKMAN. You have a written statement?

Mr. WILLARD. Yes, Mr. Chairman, and with your permission I would ask that it be submitted to the record.

Mr. GLICKMAN. Your entire statement will appear in the record.

Mr. WILLARD. First I would propose simply to summarize the statement and emphasize a few of the significant points and then I would be pleased to answer questions that you or other members of the subcommittee may have.

As you noted in your opening statement, Mr. Chairman, the Civil Division has asked this year for a budget increase of $5.7 million, and 72 positions. This is in contrast with last year when I appeared and had to explain how we proposed to handle our increased case load with no increase in the number of lawyers. This year's budget does include an increase in resources.

My prepared statement provides examples of the broad scope and variety of cases the Civil Division handles. We handle cases ranging all the way from challenges to the constitutionality of statutes cases involving Federal regulatory programs to situations where we are trying to preserve the Government's interest as a creditor in multimillion-dollar-loan defaults.

The program increases we have requested involve 14 new positions for tort litigation, where the Government, along with much of our society, has been subject to an explosion in tort claims.

We have asked for an increase of 58 positions in the commercial litigation area to handle an anticipated case load increase of 46 percent. This area includes debt collection and creditor's rights litigation, as well as civil fraud—including procurement fraud—and other fraud against the Government.

Overall the chart which I have brought with me illustrates the statistics which were provided in my prepared statement, showing the sharp growth in the number of cases being handled by the Civil Division as contrasted with the relatively modest growth of the staff available to handle the litigation.

From 1981 to 1985 our case load increased by 140 percent, while our staff increased by only 26 percent. The amount of money at issue in our pending litigation is well in excess of $100 billion.

For that reason, we think that this is a wise investment, even in a time of great fiscal restraint. The expenditure of taxpayer money to spend it on behalf of civil litigation necessary to protect the broader taxpayer interest of billions of dollars at stake in the cases is cost effective in our view. We believe it would be, in fact, penny-wise and pound-foolish to cut back on the resources available to defend the Government in these cases which could lead to far greater financial exposure than the relatively small budget request involved.

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The amount of money at issue in our cases involves both affirmative and defensive litigation. The chart on the left shows cases where the Government is the plaintiff. These are a small minority of our cases, but they still involve substantial amounts of money. In fiscal year 1985 we recovered $283 million in judgments on behalf of the Government and our recovery ratio has been running at about 20 percent over this period of time.

Meanwhile, we have been defending cases involving substantial claims against the Government, as seen on the chart on the right. In 1985, cases that were closed, either by trial or settlement, involved claims of over $13 billion and yet the Government only paid $274 million—less than 2 percent of the amount claimed.

So we think we have had a pretty good success story in terms of avoiding claims against the Government and recovering money owed the Government. Over the last 5 years, for every dollar given to the Civil Division we have defeated $859 in claims and for every dollar we have gotten we have recovered three times that amount in judgments in favor of the United States.

So, in summary, we believe that the record of the Civil Division and its lawyers is one of hard work and accomplishment in handling an ever-increasing case load with relatively modest resources. Now, some questions we get, such as last year, were, well, how do you do it? One thing I have to give tribute to is the hard work of the lawyers, the career attorneys of the Justice Department who work in the Civil Division.

Over the last 5 years our attorneys have put in over 500,000 hours of uncompensated overtime in handling their cases. The amount of overtime they have put in has been increasing every year, so one way we can make do is by working harder, and I have to say that coming from the private sector, I have been very impressed at how hard-working Government lawyers are. I used to think maybe they were kind of 9 to 5 lawyers who didn't put in a hard workday compared to lawyers in the private sector. But I was wrong. Lawyers in the Civil Division work just as hard, if not harder, than lawyers I have known in my experience in private practice.

In addition, we have invested a lot of effort in developing automated office systems and litigation support systems to allow our lawyers to work more effectively by taking advantage of the latest technology. We are proud of our record of achievement in that area as well.

I think that summarizes briefly what is in my prepared statement, Mr. Chairman, and I would be pleased now to answer any questions you or members of the subcommittee have.

[The statement and letter from U.S. Department of Justice to Hon. Daniel Glickman of Mr. Willard follows:]

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Department of Justice

STATEMENT

OF

RICHARD K. WILLARD
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

CIVIL DIVISION AUTHORIZATION

ON

FEBRUARY 20, 1986

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Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to be here today to discuss the work of the Civil Division and our 1987 budget request. The Civil Division's mission is vital to the effective and efficient functioning of the government and to the protection of the federal Treasury. Our litigation is largely defensive -- responding to mounting claims seeking billions of dollars from the Treasury and challenging key government programs. We also initiate litigation to enforce programs vital to the national interest and to recover millions of dollars owed to the government.

The Civil Division is one of the largest law offices in the country. It is our task to represent the government and its officials in a variety of civil suits including subjects as broad and diverse as the government itself. The Division retains the most significant cases for personal handling -- those involving issues which are nationwide in scope such as asbestos, those in specialized courts such as the Claims Court and particularly those with major policy implications such as the Mariel Cuban class action suits, or potential cost, as in the WPPSS cases. U.S. Attorneys and client agencies litigate the remaining cases, frequently with the benefit of extensive advice from our attorneys.

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As the members of this Subcommittee are undoubtedly aware, American society has become increasingly litigious, turning to the courts, particularly the federal courts, for the resolution of many ordinary disputes. Several variations in this national trend have caused our caseload to skyrocket, threatening our ability to maintain the courtroom success we have achieved in recent years. To keep pace with this caseload explosion, we are seeking 1987 budget increases of $5.7 million and 72 positions.

Much of the increased litigation defended by the Civil Division involves increased challenges to acts of Congress and implementing regulations by litigants attempting to extend the debate over policy into the courtroom, rather than allowing it to remain in the Legislative and Executive Branches, where it belongs. The Federal Programs Branch of the Civil Division defends against these attempts to diffuse your power and that of your constituents. Needless to say, Mr. Chairman, such suits are of the highest priority.

In addition to defending statutes and fundamental questions of constitutional law, the Federal Programs Branch is also responsible for defending legal challenges to a wide range of federal programs based upon regulations and executive actions,

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including those affecting national security, regulatory policy, personnel actions and entitlements. Because such suits attack the manner in which the Executive Branch agencies formulate and implement policy, or attack the constitutionality of a statute or regulation, they often seek injunctive relief. If these suits are not successfully defended, the impact on government operations and effectiveness would be enormous.

For instance, in Nuclear Pacific v. Department of Commerce, a plaintiff challenged, on a number of constitutional and statutory grounds, the Commerce Department's denial of a license to export nuclear plant components. Our victory in this litigation protected the government's export license procedures in the crucial area of nuclear nonproliferation. While such a victory cannot be measured in monetary terms, its importance to the United States is of the highest magnitude. In another recent victory, we successfully defended regulations of the Federal Railway Administration aimed at protecting public health and safety by controlling alcohol and drug abuse by operators of the nation's railroads. Only last week, in Railway Labor Executives Assn. v. Dole, the Supreme Court vacated a stay, granted by the Ninth Circuit, permitting these much needed rules to go into effect. The importance of such victories in terms of safety and the ability to implement public policy is immeasurable.

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Another particularly important aspect of the Branch's work is defending injunctive actions seeking a modification in the standards for the award of federal entitlements. Frequently, special interest groups challenge statutory standards and agency regulations which govern payments under the various programs. In effect, plaintiffs turn to the federal courts to attempt to gain benefits denied to them by the Congress. Cases of this nature, which may turn on intricate and complex regulatory provisions, also have major policy implications and often place at risk hundreds of millions of dollars in unappropriated funds.

In addition to the vast majority of its defensive litigation work, the Federal Programs Branch also undertakes certain select enforcement cases. For instance, we recently completed a year-long trial seeking the recall of 1.1 million "X-Cars" and the assessment of over $4 million in civil penalties against General Motors.

A trend also significantly affecting the work of the Civil Division is the explosion of tort litigation. Increasingly, courts resolving litigation have shown a tendency to compensate plaintiffs at the expense of the defendant considered most able to pay -- irrespective of established fault or proof of causation. At its root is an apparent assumption that liability

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costs would readily be covered by insurance. This has contributed to a liability insurance crisis that translates into astronomical premium increases and, oftentimes, an inability to obtain liability coverage at all.

Clearly, the federal government is the ultimate "deep pocket" for torts plaintiffs. Over the last 20 years, the caseload of the Civil Division's Torts Branch has nearly tripled. Dollars at issue twenty years ago were a mere fraction of the dollars at stake today. The torts explosion has, and will continue to, dramatically affect the federal Treasury.

To address all these issues in a coordinated manner, the Attorney General recently established the Tort Policy Working Group, an interagency task force created under the auspices of the White House Domestic Policy Council. We will work closely with Congress on legislative proposals targeted to reform tort law as it applies to government and contractor liability, medical malpractice and product liability. We anticipate that legislative reform will take time and we do not expect to see "dividends" for a number of years. In the meantime, we are faced with a burgeoning in the number and size of torts claims -- exposing the Treasury to a potential loss of billions of dollars. This growth in tort litigation has occurred across the board, including aviation accident claims, medical malpractice

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suits, Bivens litigation, and the entire spectrum of government activity, including law enforcement, regulatory actions, contract disputes and prisoner claims.

We are requesting an additional $3.2 million and 14 positions to handle the expected 27 percent increase in workload over the next two years. Highly technical, multi-million-dollar, medical malpractice claims against the government are skyrocketing and are expected to reach $46.7 billion by 1987. The growth in asbestos claims continues despite our success to date in the defense of these claims. Constitutional tort, or Bivens, suits continue to grow and require significantly more attorney time and support time to litigate. Increased resources must also be devoted to the initiation of claims to recover dollars for damages sustained by the government, such as in affirmative admiralty cases.

Another trend which is contributing to the surge in civil litigation is the growing volume of federal contracting. Over the last ten years, the government's purchase of private sector goods and services has grown by 188 percent -- in 1985 alone the federal government spent $340 billion on goods and services. The Civil Division plays a critical role in defending the government's interest in disputes with contractors. A strong defense and timely resolution of disputes is crucial for

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efficient awarding and performance of contracted services. As these outlays increase, litigation resulting from commercial expenditures rises -- presenting our Commercial Litigation Branch with an ever growing caseload.

Increased defense spending, along with strengthened efforts to monitor defense procurement, has increased civil fraud referrals and defense procurement fraud litigation. In 1982, the Defense Procurement Fraud Unit was established jointly by the Department of Justice and the Department of Defense to focus on fraud in defense procurement contracts.

Heightened activity by the Defense Procurement Fraud Unit and the Inspector Generals of all the agencies has generated a sharp increase in civil fraud referrals. For instance, referrals from the Defense Contract Audit Agency (DCAA) alone have increased from 40 in FY83 to 170 last year. Because of the large dollar amounts at stake and case complexity, these fraud referrals require a proportionately greater allocation of attorney time.

The Commercial Branch also initiates cases asserting the government's creditor rights in loan defaults and bankruptcies. This has also been a growth area because of structural changes in the economy which have placed in jeopardy

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many federally guaranteed loans. For instance, an increasing number of utility cooperatives which are major borrowers from the Rural Electric Administration (REA) have defaulted, or are in threat of defaulting, on loans. We also have instituted foreclosure actions on nearly one billion dollars of defaulted Maritime Administration loans. In addition, our Commercial Branch recently won another major victory in enforcing the government's contract rights to sell natural gas produced at the Great Plains Coal Gasification Project, thus permitting the project to continue.

Commercial attorneys handle all cases against the government in the Court of International Trade, the Claims Court and the Court of Appeals for the Federal Circuit. Many of the cases we litigate in the Court of International Trade significantly affect the nation's international trade policy. The expanded trial court jurisdiction of the Claims Court and the exclusive appellate jurisdiction of the Federal Circuit have caused a tremendous increase in the commercial caseload. Division attorneys are now responsible for Merit Systems Protection Board appeals, previously handled by U.S. Attorneys and heard in the Circuit Court of Appeals.

Finally, Mr. Chairman, the Administration and the Attorney General have placed great importance on the task of collecting

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debts owed to the United States as a result of defaulted loans, settlements or judgments, and other court-imposed obligations. While the U.S. Attorneys handle the great bulk of the debt collection litigation, our Commercial Branch plays a leading role in handling major cases as well as in coordinating collection matters. And this commitment to debt collection has paid off handsomely -- over $1.4 billion in cash has been deposited in the U.S. Treasury since the effort began in 1981.

In sum, the routine business litigation of the federal government continues to increase apace. By 1987, we expect a 46 percent increase over our present commercial litigation caseload. We request an increase of $2.5 million and 58 additional positions to effectively deal with accelerating caseloads and the growing complexity of cases and to defend the Treasury against billions of dollars at issue.

Since 1983, the Civil Division has been responsible for enforcing civil immigration and naturalization laws, a vital mission in our effort to regain control of our borders. It is our job to conduct prompt and efficient litigation of cases ranging from the routine challenge of a single alien's deportation to the massive undertakings involving huge classes of aliens such as the litigation involving the Mariel Cubans.

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Attorneys in our Office of Consumer Litigation institute affirmative litigation to protect public health and safety and regulate unfair and deceptive trade practices in interstate commerce. We enforce programs governing food and drugs and consumer devices and products by initiating litigation to ensure that unsafe and adulterated products do not reach the public.

Finally, the Civil Division has a specialized appellate staff of attorneys who litigate cases challenging trial court and administrative decisions in favor of the United States and cases seeking to reverse decisions against the government. Our appellate staff has sustained a remarkable rate of success, winning approximately 83 percent of the appeals cases they handle -- a select class of cases involving the most sensitive and difficult legal issues. In the last arena for the defense of the government's interests, our attorneys also assist the Office of the Solicitor General in litigation before the Supreme Court.

In reviewing our litigation, I cannot stress enough the major impact which the continuing, unrelenting growth in our caseload has had on the Division. Between 1981 and 1985, the Civil Division's overall caseload has increased by 140 percent, while staff has increased by 26 percent. In order to keep pace with these suits, we have made efforts to enhance the efficiency

of our attorneys. Investing in technology has greatly improved the productivity of our workforce of attorneys, managers and support staff. Our integrated office automation system is tailored to the needs of our Division attorneys -- providing attorneys and support staff the tools they need to efficiently and effectively conduct legal research and create numerous legal documents for court filings.

We have succeeded in bolstering our trial attorneys' effectiveness through our Automated Litigation Support program. This program provides an economical approach to acquiring and handling massive volumes of discovery, evidentiary and transcript documents critical to the successful outcome of complex litigation. It has played a pivotal role in major litigation such as Asbestos, WPPSS and General Motors. Keeping pace with innovative approaches to office automation and litigation support has enabled us to approach parity with the private bar.

Finally, the dedication, hard work and enormous professional pride of our attorneys and support staff have been invaluable in meeting this challenge. Over the past five years, we estimate that our attorneys contributed 525,468 hours of uncompensated overtime -- the equivalent of having an extra 60 attorneys at no cost to the Treasury.

In the final analysis, Mr. Chairman, our record of success is an excellent one. Civil Division attorneys successfully defeat more than 98 percent of the monetary claims brought against the United States. In 1985, we terminated over 9,000 cases seeking claims of $13.3 billion at a cost of only $274 million. At the same time, our attorneys obtained judgments totalling $283 million from our affirmative litigation. Viewed another way, for every dollar appropriated to the Division over the past five years, we defeated $859 in claims, while securing three times each appropriated dollar in recovery judgments. Overall, we actually collected and deposited to the Treasury one-and-a-half times our total budget.

Mr. Chairman, I would be glad to answer any questions you or members of the Subcommittee may have.

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U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

FEB 20 1986

Honorable Daniel Glickman
Chairman
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Following my testimony before the Subcommittee on March 5, 1985, the Subcommittee heard testimony from Mr. John Michael Gravitt and his attorney, Mr. James Helmer, as to the Justice Department's handling of the qui tam action which Mr. Gravitt brought against General Electric on behalf of the United States. Because Mr. Helmer's testimony contained serious misstatements as to the government's handling of this action, I would like to take this opportunity to set the record straight.

The instant action was brought under the citizens suit or "qui tam" provisions of the False Claims Act, 31 U.S.C. § 3730, by Mr. Gravitt against his former employer, General Electric. Let me state at the outset that Mr. Gravitt is to be commended for his actions in this case. By coming forward when he did, he helped to expose a conspiracy to falsify time cards and vouchers in the DMO machine shop at G.E.'s Evendale plant, which prevented the government from gaining a true picture of labor costs in that shop.

Notwithstanding Mr. Gravitt's help in exposing mischarging in the DMO machine shop, Mr. Gravitt and his attorney evidently remain under a severe misapprehension as to the true facts of this case despite the extensive briefings they have received by Justice Department and FBI personnel.

First and foremost, after an estimated 5,000 hours of investigation, the government has concluded that it has suffered no measurable monetary damage due to the mischarging in the DMO

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shop. While there was undoubtedly a conspiracy to mischarge hours systematically in the DMO shop, our investigation led us to conclude that the mischarging was done in an effort to meet internal G.E. production guidelines, and not to defraud the government. In fact, it appears that the United States was actually undercharged due to this conspiracy. In effect, the conspiracy Mr. Gravitt uncovered was designed to defraud General Electric and to protect the jobs of employees in the DMO shop, not to defraud the government.

More seriously, upon reviewing the transcript, I see that Mr. Helmer left the Subcommittee with the impression that in our handling of the civil suit, the Department failed to conduct an adequate investigation of this matter, and that in reaching a settlement with G.E., we simply accepted their view of the facts and entered into a "sweetheart" deal. Nothing could be further from the truth.

Almost a year before Mr. Gravitt filed suit in October 1984, his allegations had been brought to the attention of the Defense Contract Audit Agency (DCAA) by General Electric after it had conducted its own internal investigation prompted by Mr. Gravitt's letter to them of June 30, 1983. DCAA reviewed G.E.'s internal investigation and the work papers underlying that study. They determined that the government had suffered no loss as a result of the scheme, and were satisfied that G.E. was taking adequate steps to correct the problem. In light of those findings, DCAA determined not to refer the matter for prosecution.

After Mr. Gravitt's suit was filed, the United States Attorney in Cincinnati took over the action. Due to the seriousness of the allegations in Mr. Gravitt's complaint and the accompanying disclosure statement, and the fact that we had what then appeared to be a similar action pending against G.E. in Philadelphia, the investigation was reopened for both criminal and civil purposes by the United States Attorney. As is our practice in such cases, we sought a stay of the civil proceedings so that General Electric would not have the opportunity to use the liberal civil discovery rules to discover aspects of the government's criminal investigation.

Over the course of that investigaton, which lasted from approximately December of 1984 to August of 1985, the FBI, the Air Force Office of Special Investigations and the DCAA interviewed approximately 35 witnesses and, with the cooperation of G.E., conducted an extensive audit of the activities of the DMO shop from 1981 through 1983. Of the approximately 60,000 time cards generated during that period, we selected for careful review by government auditors a sample of approximately 12,500, representing all the timecards from six non-consecutive

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months. Where necessary, special infra-red analysis was used to determine how timecards had been altered. In summary, we determined that for every five hours mischarged on the altered cards, one was mischarged to the detriment of the government, two were mischarged to the detriment of G.E. and two had a neutral impact. It was on the basis of this investigation that the Department, and all of the investigating agencies, concluded that the government had not been defrauded by the scheme.

Further, because this investigation was conducted before any grand jury testimony was taken (that did not occur until August or September, 1985), the fruits of the investigation could be and were, in fact, shared by both criminal and civil attorneys in the Department. In short, the strictures of Rule 6(e) of the Federal Rules of Criminal Procedure, as interpreted by the Supreme Court in United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983), did not impede the Civil Division's evaluation of this case. We did not move for a court order for access to the grand jury testimony for the simple reason that it was not necessary; the prior investigation was more than adequate. Our conclusions in this regard are buttressed by the fact that the prosecutors in the Department declined to bring criminal charges against G.E. or the individuals involved.

Thus, by September of 1985, we realized that Mr. Gravitt's charges related to a serious situation involving mischarging in the DMO shop, but one in which the United States had suffered no measurable damage. Moreover, in both the criminal and the civil cases, we would have been required to prove that G.E. intended to defraud the government by the scheme. Obviously, this was not a case which we believed we could prove. Nevertheless, because some of the Evendale plant's monthly claims on government contracts could technically be considered false because they did not present a true picture of the work being done in the DMO shop, even though their falsity resulted in a net undercharge, we were able to use the False Claims Act's civil penalty provision aggressively in settlement negotiations, which ultimately yielded the $234,000 settlement currently at issue.

Under the False Claims Act, the government is entitled to double its actual damages, plus a $2,000 civil penalty for each false claim or false statement submitted to get a claim paid. In this case, we determined that there were 303 monthly billings by the Evendale plant which included DMO work for the relevant period. Using the ratio of overcharges to undercharges developed through the audit of the six-month sample, DCAA was able to estimate that 117 of the 303 claims were likely to have resulted in falsely inflated charges to the government. The settlement amount reflects a $2,000 forfeiture for each of these claims.

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Mr. Helmer's apparent confusion arises from his erroneous belief that because the government received a $2,000 civil penalty for each false timecard in an apparently similar case against G.E. in Philadelphia, it should have received a similar award in this action. (He calculates that the government should get a $2,000 forfeiture for each incorrect time card, or a total of $36 to $48 million.) However, in the Philadelphia case the criminal action was based upon G.E.'s actual submission of the false timecards in connection with a post payment audit of claims. G.E. pleaded guilty to submitting four false claims and making 100 false statements to the government by presenting 100 false timecards in connection with the audit. In their effort to resolve their civil liability under the False Claims Act, G.E. offered to pay the government $1.9 million. Their calculation apparently included doubling of the actual damages which the government suffered as a result of the scheme, plus a $2,000 civil penalty for each of the false statements and claims.

Unlike the Philadelphia case, in the present case, G.E. never presented the false timecards to the government representing them to be true. When G.E. management learned of the falsity of the timecards by way of Gravitt's letter, they informed DCAA. Therefore, there was no basis for asserting that each of the timecards was a false statement submitted to the government in order to get a false claim paid. Moreover, even if we were able to demonstrate that thousands of false timecards had been presented to get the claims paid, courts have often held, over the government's objection, that they have discretion to reduce the number of forfeitures if the amount is grossly out of line with the government's actual loss. See, e.g., Peterson v. Weinberger, 508 F.2d 45 (5th Cir. 1975).

Finally, Mr. Helmer alleged that the Department threatened his client with the loss of the 10% of the recovery to which he might have been entitled as a qui tam relator if he objected to the government's "sweetheart settlement." In fact, during the course of settlement discussions, our attorney informed Mr. Helmer of our intention to settle with G.E. for $234,000 and pointed out, in connection with Mr. Helmer's objections to the settlement amount, that the government believed that it knew of Mr. Gravitt's allegations before he brought the suit, and therefore, a court could find that he was not a proper plaintiff or "relator" under the Act. Our attorney explained further that if he found it necessary to formally object to the settlement in court, we would defend the settlement on the ground, among others, that Mr. Gravitt was not a proper relator under the Act because of the government's prior knowledge, and thus Mr. Gravitt had no standing to object to the settlement. As a matter of courtesy, our attorney also informed Mr. Helmer that if that argument was accepted, Mr. Gravitt would, as a matter of

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law, not be entitled to a court award of up to 10% of the recovery. Because we faced some litigation risk that a court might deem the government's knowledge insufficient in light of the extent of Mr. Gravitt's disclosure statement and the fact that the government did not initially proceed with the case, we were prepared to give up our right to object to Mr. Gravitt's status as a proper relator in exchange for Mr. Gravitt foregoing any objection to the settlement with G.E.

The statements made to Mr. Helmer should be received in this light and not as threats in an effort to prevent public disclosure. As I noted above, we believe that we reached a good settlement, which we are prepared to defend before the District Court.

I trust that this answers any questions which might have arisen about the Department's handling of this case. If necessary, we would be prepared to provide a more detailed briefing for members of the Subcommittee or staff. While we do not ordinarily like to discuss pending litigation in such detail, I felt that it was essential to set the record straight in this matter.

Sincerely,

Richard K. Willard

RICHARD K. WILLARD
Assistant Attorney General

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Mr. GLICKMAN. Thank you, Mr. Willard. I am going to go through a series of different areas and appreciate, if possible, your answering to the best of your knowledge a variety of areas, some you may not know and you may have to respond in writing.

I first would like to go into the matter that this committee dealt with when we had our hearing on the False Claims Act, and at that point we had the testimony from a Mr. Gravitt, John Michael Gravitt, a former employee of the General Electric Co. and his attorney Mr. James Helmer as to the Justice Department's handling of the qui tam action which Mr. Gravitt brought against General Electric on behalf of the United States.

You have supplied the committee with a letter directed to me, an indepth letter describing the Justice Department's involvement with that case. That letter will be made part of your testimony today, and the hearing record in this particular case, but I wonder if you might summarize for me for a moment your response to the allegations that the Justice Department mishandled this case, that you pressured Mr. Gravitt and his attorney to settle this case not in accordance with the allegations brought that the Justice Department did not fully investigate the case and related matters.

Mr. WILLARD. Mr. Chairman, as you know, we have since Mr. Gravitt's testimony provided both you and members of the subcommittee staff with briefings about this matter and I have, as you noted, provided the subcommittee this morning with a lengthy letter discussing this case.

[DOJ letter follows:]

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

12 MAR 1986

Honorable Dan Glickman
Chairman
Subcommittee on Administrative Law
and Governmental Relations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter of February 24, 1986 requesting answers for the record to a number of matters not fully addressed at the recent Civil Division Authorization hearing. For your convenience, the Subcommittee's questions are reprinted along with our responses.

I. ADMINISTRATIVE HANDLING OF TORT CLAIMS

On December 7, 1984, the Administrative Conference of the United States adopted a recommendation concerning the administrative settlement of tort and other monetary claims against the Government. The recommendation centered on the Federal Tort Claims Act in its dicussion of administrative settlements.

Question 1a:

The recommendation stated that the Attorney General should amend his regulations to provide for some flexibility concerning the statute of limitations. The two-year statute governing tort claims is statutory. Can a statute of limitations be varied by regulations?

Response:

The period specified by the two-year statute of limitations established by 28 U.S.C. § 2401(b) cannot be varied by regulation. We believe, however, that the Attorney General is

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empowered under 28 U.S.C. § 2672 to determine the manner in which a claim is presented, i.e., whether presentation is completed by the act of mailing the claims or whether the claim must be received by an appropriate agency within the statutory period, as the regulations provide. Cf., Warren v. United States Department of the Interior, 724 F.2d 776 (9th Cir. 1984) (en banc).

Question 1b:

The recommendation suggests that claims officers should comment on the insufficiency of information submitted in connection with the claims and warn the claimant of the potential dismissal for failure to substantiate. What is your opinion of this proposal?

Response:

We agree with this recommendation. The Department of Justice encourages agency claims officers to advise claimants of errors in their claim submissions which are subject to correction.

Question 1c:

Similarly, the recommendation suggests that a claimant should have access to relevant information in that individual's own claim file to obtain relevant information. What is your view of this approach to discovery?

Response:

This approach to discovery is inadvisable. Absent a mutually negotiated disclosure plan, unilateral disclosure of documents supporting the strengths and weaknesses of a claimant's case as a requirement of the administrative process will tilt the administrative process too far toward it becoming a pre-litigation discovery vehicle for claimants and unfairly prejudice the government's negotiating position since claimants will not be under any compulsion to reciprocate. This concern is also reflected in settled privileges applicable to much of the material.

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II. CONSTITUTIONAL TORTS

Question 1:

In regard to constitutional torts, how many judgments were entered against the United States during Fiscal Year 1985?

Response:

In 1946, the Federal Tort Claims Act waived sovereign immunity and permitted suit against the United States as if it were a "private person . . . in accordance with the law of the place where the act or omission occurred. . . ." (28 U.S.C. 1346(b).) This waiver of sovereign immunity for common law tort suits does not extend to suits brought for alleged violations of rights created by the Constitution. Thus, no judgments were or could have been entered against the United States during Fiscal Year 1985 for constitutional torts because the sovereign remains immune. As you know, this administration has supported legislation which would waive the immunity of the sovereign for constitutional torts as well as common law torts and make the resulting remedy of suit against the United States an exclusive one.

During Fiscal Year 1985, the Torts Branch of the Civil Division received 965 complaints seeking damages from federal employees in their individual capacity. The suits alleged both constitutional and common law torts, primarily the former. Despite the difficult issues presented by this growing caseload, we have had excellent results in this area of litigation. We are aware of only 7 adverse judgments that were entered in calendar year 1985, and of only 33 judgments that have been entered since the Supreme Court's Bivens decision in 1971. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Question 2:

What percentage of claims brought against the United States are settled, as opposed to litigated? What criteria is used to determine whether to settle a case?

Response:

As indicated above, the sovereign remains immune from suit for constitutional torts. Individual defendants have settled only an insignificant handful of the thousands of cases brought since 1971.

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III. DEBT COLLECTION LITIGATION

Question 1:

What are the Department's policies regarding litigation for the collection of debts?

Response:

Once the debt is referred by the agency to the U.S. Attorney's Office which has the jurisdiction to obtain a judgment against the debtor, the office moves quickly to institute a suit against the debtor to collect the money owed the federal government. In settling litigation priorities, some consideration is obviously given to the size of the debt and its potential collectability.

Question 2:

Do you have any figures on the amount of delinquent debts you have recovered in the last fiscal year? If so, please supply these to the Subcommittee.

Response:

The total cash collection figure reported by U.S. Attorneys and the Department of Justice litigating divisions for FY 1985 was $379.8 million.

Question 3:

Do you know how many debts are becoming "unrecoverable" due to the fact that statutes of limitations are running on the debts because no legal action has been taken? What is the dollar figure involved?

Response:

In testimony given at a September 26, 1985 hearing on the Federal Debt Recovery Act of 1935 before the Subcommittee on Energy, Nuclear Proliferation and Government Processes of the Senate Governmental Affairs Committee, Richard Hastings, Director of the Debt Collection and Management Assistance Service of the Department of Education, stated that the General Accounting Office had recently done an audit of Education's collection efforts, including both federal collectors and the collection agencies. Mr. Hastings said that

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GAO's estimates showed that about 500,000 of Education's cases had gone beyond the statute of limitations. The Department of Justice does not have any statistics from other government agencies on their backlog of cases.

Question 4:

Does the Department need more attorneys and paralegals in the U.S. Attorneys' Offices to staff a strong debt recovery program?

Response:

If more resources are to be provided for debt collection efforts, the need is less for more Assistant U.S. Attorneys but rather for more Legal Technicians and money for better automated systems to handle the processing of, and recordkeeping on these debtors.

Question 5:

A bill has been introduced in both the House and Senate -- at the request of the Administration -- to authorize the Department of Justice to contract with private attorneys for litigation to collect debts. What would the adequate supervision of such attorneys cost the Department?

Response:

Different versions of this legislation specify different numbers of attorneys and law firms to hire. Thus, it would depend on how many firms we have to retain in each judicial district.

Question 6:

Can private attorneys constitutionally litigate on behalf of the United States?

Response:

The Office of Legal Counsel opined that the Attorney General has no authority under existing law to contract out to private attorneys responsibility for conducting debt collection litigation on behalf of the United States or any of its agencies. Therefore, it would take new legislation to empower the Attorney General to retain private attorneys to collect debts due the United States. Whether such legislation would be constitutional would depend upon the specific provisions enacted.

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IV. GLOBAL SETTLEMENTS

Question 1:

What is the Department's policy regarding global settlements?

Response:

The Department does not oppose global settlements in principle. As lawyers, we recognize that benefits can accrue to a party to multi-faceted litigation, including the government, by the complete resolution of all the controversies. Typically, a global settlement involves simultaneous or coordinated resolution of the criminal, civil and administrative (i.e., debarment) liabilities which may arise from a single fraud or event. The initiative for such discussions comes from the potential litigant who is confronted with this three-pronged exposure.

Within the past year, the Department has expressed reservations about global settlements, principally because they become unwieldy, protracted, and complex. As a result, the Criminal Division, for example, has announced that it will no longer entertain plea bargain discussions which are linked to the resolution of debarment issues administratively. Thus, the practice has declined, although they still retain some utility.

Question 2:

How frequently does the Department settle a case in one city against a particular company and as a result of that settlement, agree not to prosecute the same company for the same type of activity in other locations? Are these blanket settlements or would they involve only currently pending litigation?

Response:

Our settlements and plea bargains are typically limited to the controversy at issue. The release is geared to specific contracts, a specific time period, even a specific type of misconduct. For example, when we settle a mispricing case, we typically reserve our rights regarding defective goods; if the release is broader, it is because we have obtained agency approval of the language.

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Question 3:

Do these kinds of settlements really save the government money?

Response:

We believe that global settlements are often advantageous to the government due to an opponent's anxiousness to put the controversy behind him and to revive a business life that, in many cases, has been stopped dead in its tracks. In our view, settlements are not infrequently more beneficial because our combined leverage is greater than that which could be obtained if the controversies were negotiated serially and independently. This is largely a subjective assessment. No doubt the opponent may also feel that he benefits from being able to offer the government a total resolution of a controversy which otherwise might require three teams of attorneys to litigate, and the attention of knowledgeable agency program personnel whose assistance would be required in each case. As a general observation, an overture to consider a global settlement generally advances in time the resolution of the civil and administrative cases, which generally would otherwise follow the resolution of the criminal case. Thus, the latter two determinations do benefit in a real sense.

Question 4:

Do global settlements deter future fraudulent activity by the company involved?

Response:

We believe good settlements are frequently best obtained in a global environment. Most businesses are not corporate outlaws by deliberate company policy. Those that are are generally closely-held businesses run by a single individual. Publicly-held companies do seem to be genuinely troubled by both the misconduct uncovered and the corporate consequences incurred in attaining a resolution of the government's charges.

V. PROCUREMENT FRAUD UNIT

Question 1:

How much of the Civil Division Budget is allocated to the Procurement Fraud Task Force? What is the number of Department of Justice personnel assigned to this Task

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Force? Are these permanent positions? Attorneys or clerical? Who is in charge of the Defense Procurement Fraud Unit?

Response:

The Civil Division currently has two attorneys assigned part-time to work with the Fraud Unit, where they review matters referred by the Defense Department for potential civil prosecution. In addition, the Unit is staffed by a total of 13 full-time attorneys and 6 full-time investigators and auditors from Defense and Justice. The head of the Unit is Mr. Morris B. Silverstein.

Question 2:

How many fraud cases have been referred to the Department of Justice since 1982? How many of these cases were handled through the Defense Procurement Fraud Unit?

Question 3:

How many cases referred through the Defense Procurement Fraud Unit resulted in suits filed and judgments rendered or settled? How many suits have been lost? How many refused for prosecution?

Question 4:

What is the percentage of cases that result in awards to the United States? (Please break this down between cases handled through the Defense Procurement Fraud Unit and general fraud cases handled by the Department of Justice.)

Response:

Unfortunately, our statistics do not permit us to break down our case referrals based on matters referred by the Defense Procurement Fraud Unit and other matters; however, in an effort to provide information useful to the Committee, we have compiled the following statistics on civil fraud enforcement:

- 31 civil fraud suits were authorized in FY'84 for approximately $76.6 million
- 59 civil fraud suits were authorized in FY'85 for approximately $81.4 million
- 124 judgments or settlements were obtained or approved in FY'84 and '85 for approximately $105.3 million

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- We are actively litigating 10 additional major cases for approximately $40.4 million where suit was authorized prior to FY'84
- We are actively considering civil fraud suits in at least 50 additional major matters involving at least $113 million.
- We analyze about 3,000 preliminary investigative reports each year for possible civil action.
- Projections are difficult to make, but the number and size of these cases are expected to continue to increase.

  For example:

  - The number of potential fraud matters brought to our attention by the Defense Contract Audit Agency has grown from approximately 40 two years ago to approximately 170 for the year ending September 30, 1985.
  - The Defense Procurement Fraud Unit and the Civil Division are involved in 35 potential fraud matters with 22 of the nation's top 100 defense contractors.

Question 5:

How were defense fraud cases handled prior to the formation of the Defense Procurement Fraud Unit?

Response:

Prior to the creation of the Unit, both DCAA audit reports of suspected accounting fraud activity and DOD non-accounting allegations of possible criminal activity were referred to the DOD investigative agencies. Some of the DOD non-accounting matters were also referred to the FBI. After investigation, matters were referred directly to the 94 U.S. Attorneys' Offices, where they were either accepted or declined. Many times they merely languished because there was no procedural mechanism in place to focus special attention on these cases.

Question 6:

It is my understanding that the purpose of the Defense Procurement Fraud Unit is to handle complex and nationally significant cases so as to deter fraud by defense contractors. How many indictments has this unit obtained against major defense contractors? How many convictions have been obtained against major defense contractors?

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Response:

As the enclosed compilation of cases indicates, the Fraud Unit has reviewed and processed a significant number of criminal matters, involving all types of defense fraud. As of January 27, 1986, of the 45 indictments or informations handed down, we have gained convictions or received guilty pleas in 40 matters, three are pending, and in only two cases was the defendant acquitted.

Question 7:

Is the Defense Procurement Fraud Unit fulfilling its goal of deterring fraud and prosecuting complex and nationally significant cases?

Response:

We are satisfied that the Defense Procurement Fraud Unit is functioning effectively to provide a much-needed focus to this critical issue. The enclosed testimony of Deputy Assistant Attorney General Victoria Toensing, delivered before the Senate Judiciary Committee last fall, provides a more comprehensive explanation of the goals and achievements of the Unit.

VI. WARTIME RELOCATION AND INTERNMENT OF CIVILIANS

Question 1:

This Committee has twice requested a report and recommendation from the Department of Justice on H.R. 442 and its predecessor bill, H.R. 4110 (on May 2, 1984 and May 20, 1985, respectively). When can the Subcommittee expect the Department to repond to these requests?

Response:

The Department is aware of the Subcommittee's interest in this legislation. We have drafted extensive legislative comments on H.R. 442, which are currently in the final stages of review and will be submitted to the Subcommittee shortly.

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I trust that the foregoing responses have adequately clarified these matters and addressed the concerns of the members of the Subcommittee.

Sincerely,

John R. Bolton

JOHN R. BOLTON
Assistant Attorney General

Enclosures

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Mr. WILLARD. It is a matter of pending litigation but because of the importance of the case and the committee's very legitimate interest in the way the case has been handled, we tried to respond just as fully as we know how.

The propriety of the settlement is an issue which is in litigation. That is, Mr. Gravitt's attorney has challenged it. It is now a pending matter before the District Court for the Southern District of Ohio. My understanding is that a special master or magistrate is going to conduct the hearing and review evidence and determine whether or not it was a reasonable settlement. We haven't seen the last chapter on this matter; it is a matter that will be before the court.

Essentially, from the information available to me, it appears that Mr. Gravitt, quite commendably, discovered a serious scheme of mischarging in the DMO machine shop at the General Electric Evandale plant. This was investigated by DCAA, the Defense Contract Audit Agency which decided not to make a referral to the Justice Department.

As I understand it, their analysis at the time, was that the net effect of the scheme was not to defraud the Government of money. Subsequently Mr. Gravitt filed his qui tam action and the Government entered the case. Initially the civil proceedings were stayed to permit a criminal investigation to be conducted and ultimately the criminal prosecution was declined by the prosecutor. The Civil Division then got back into the act and based on its analysis of the case negotiated a settlement with General Electric.

The case, as our analysis indicated, appears to involve a mischarging scheme that was not designed to defraud the Government but rather designed to meet internal production guidelines in the machine shop at General Electric. This would have some effect on the way people were laid off and on the productivity analysis of this unit. Based on an audit of the altered time records and the submissions that were made, the determination of the auditors and investigators who looked into it was the net effect of the scheme was actually to undercharge rather than to overcharge the Government. Hence what you actually have is a series of technical violations of the False Claims Act but not violations which caused provable damages to the Government. If anything, General Electric might have been able to go back and try to get extra money from the Government on the theory that the Government had been undercharged on these contracts.

Under the settlement we negotiated GE agreed to pay the $2,000 statutory forfeiture for each false claim which included an overcharge. The forfeiture not assessed for ones that resulted in an undercharge. In addition, GE agreed not to try to bill the Government for the undercharges that were made or for the costs of the investigation of the case.

As you indicated, in an effort to wrap up the litigation once and for all, our attorneys did attempt to get Mr. Gravitt to agree to the settlement. Mr. Gravitt and his attorney did not agree to the settlement. The Government took the position that the settlement did not require their agreement, but the district court found otherwise, and now there will be a proceeding in the district court as to whether or not the settlement was reasonable. That is where the

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matter stands. All of the information that we have indicates that this is a case that involved a complex scheme, but not one which was intended to or had the effect of actually defrauding the Government.

Mr. GLICKMAN. So basically you are taking the position that the false timecards were done for internal purposes within the operation of the GE plant rather than for the purpose of obtaining additional money wrongfully from the U.S. Government in connection with contracts?

Mr. WILLARD. That was our analysis, Mr. Chairman.

Mr. GLICKMAN. The mere fact that you had, however, false timecards, did you discuss this with officials of the Defense Department to try to perhaps investigate why a contractor, why people at a defense contractor would be presenting false timecards, even if they were not done for the purpose of defrauding the Government of the United States?

Mr. WILLARD. The indications we had were that the alterations were made in an effort to meet internal production guidelines and to protect the jobs of the employees working in the machine shop, rather than to defraud the Government. It involved a fairly small unit within the Evandale plant, and was not a plantwide activity.

Mr. GLICKMAN. Now, one of the things that apparently when Mr. Helmer, the attorney for Mr. Gravitt, was involved in the connection in the settlement, and you even have this in your letter. You indicated that if Mr. Helmer objected to the settlement you indicated that the Government believed it knew of Mr. Gravitt's allegations before he brought the suit, and that therefore Mr. Gravitt's recovery under the qui tam statute might not be sustainable in a court of law.

But isn't it true that Mr. Gravitt brought the allegation to the attention of somebody and that the reason why all of this mess was made aware to both GE as well as to the Government.

Mr. WILLARD. That is certainly true, Mr. Chairman, and we think that Mr. Gravitt should be commended for exposing what was going on there.

But as a legal matter, as I understand it, he reported the mischarging to GE, and GE reported it to the Department of Defense back in, I believe, 1983. When no action was taken, when DCAA decided not to refer the matter to the Justice Department, then Mr. Gravitt filed a qui tam suit. However, it is our position in the litigation that he did not file the suit based on information, that was unknown to the Government. The information underlying his suit had been previously reported by GE to DCAA and so as the statute operates, he would not be a proper relator and would not be entitled to the 10 percent of the recovery which the qui tam plaintiff who files a suit based on new information would receive.

Mr. GLICKMAN. Yes, this of course is a real catch-22 because if you are going to enforce that to the letter of the law, then the qui tam attorney would have to file suit before he had even notified the company, which is the exact way you wouldn't want it to work. Wouldn't you want that notification to occur to the company in order to try to get them to resolve it without having to go into court?

Mr. WILLARD. Well, actually, Mr. Chairman, I think that if the information had only been reported to the company, that alone would not have prevented Mr. Gravitt from being a proper relator. However, once it was reported to the Government, then it would.

Now, this certainly does create a catch-22 situation and is one of the awkward parts of the statute.

Mr. GLICKMAN. If you report something to a company and they don't do anything, but you have come up with the information then you sue and the Government says, "Aha, we knew about it before you did," but you really didn't unless he had really brought it in the first place, it seems like it is rather unfair to engage in a prejudicial decision not to allow a person that recovery.

Mr. WILLARD. The reason the statute is written this way is to avoid parasitical lawsuits where a qui tam plaintiff would file suit because he learned about a pending criminal investigation and decided to jump in and collect a percentage of the civil recovery without having actually provided new information.

Mr. GLICKMAN. But it is clear in this case that Mr. Gravitt provided the information. He was not a parasite.

Mr. WILLARD. It certainly is, Mr. Chairman. I am just explaining why this statute was drafted the way it was when Congress amended it back in the 1940's.

Now, one possible solution to the problem of this disincentive to report information, would be to create a kind of a reward program similar to the one that the Attorney General has under the recent crime legislation. Thus, the Government could provide rewards to people who come forward without requiring them to file qui tam suits. This would create an incentive for people to provide the information rather than a disincentive. This is one possibility the committee might want to consider.

Mr. GLICKMAN. Now one of the other things Mr. Gravitt's attorney alleged was that this was part of your settlement of the case, the civil settlement of the case, was part of a sweetheart deal that in fact there had been a criminal investigation in Philadelphia involving the same company and that this was involved as a part of a global settlement in that General Electric and the Government had worked out their problem in connection with the criminal case, at least with respect to the company, and therefore, your actions with respect to the civil case in Cincinnati were part of that global settlement, and I wonder if you might speak to that. Is that true?

Mr. WILLARD. The actions in Cincinnati were related to the situation in Pennsylvania in this sense: when the qui tam suit was filed and the Justice Department looked at it, we realized that these allegations that had been previously considered and rejected by DCAA.

But notwithstanding that, we went back and did a new investigation. We took the allegations very seriously because of a similar problem that had occurred in Pennsylvania involving mischarging which led to a criminal prosecution as well as a civil settlement.

So Mr. Gravitt's allegations were investigated a lot more thoroughly than they might otherwise have been because they did suggest that this scheme was similar to one that had occurred at another GE plant.

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But as far as I know, there was no quid pro quo or relationship in the resolution of the two matters. The resolution of the Philadelphia matter was handled by the U.S. attorney's office there. I am not aware of any interrelationship between the two matters: the one in Philadelphia, which was done primarily through the U.S. attorney's office there and the one in Cincinnati, done primarily through the U.S. attorney's office there.

Mr. GLICKMAN. Would anybody else be aware beside yourself whether this was part of a global settlement?

Mr. WILLARD. I would think certainly that I would have been aware if it was part of a global settlement.

Mr. GLICKMAN. But the settlement of the case in Cincinnati was basically handled on its own and unrelated to the criminal case and the disposition of it in Philadelphia?

Mr. WILLARD. That is correct; other than the fact that we looked at it a lot more seriously to see whether the allegations were meritorious because we knew there was a similar scheme that had been uncovered in Philadelphia. We wanted to make sure this was looked at very carefully, and for that reason it was taken a lot more seriously.

Of course, as with both teams, with the civil aspects of both settlements, did come through Civil Division for approval.

Mr. GLICKMAN. Did the Philadelphia case also involve timecards?

Mr. WILLARD. That is my understanding, Mr. Chairman.

Mr. GLICKMAN. But again the allegation in that case is that those timecards were changed and the net effect was the Government suffered a loss in that case whereas in the Cincinnati case the Government did not suffer a loss?

Mr. WILLARD. That is my understanding, Mr. Chairman. Now I have not reviewed the facts of the Philadelphia case in great detail recently, but there was a settlement there.

Mr. GLICKMAN. Your letter, on page 4, says, "unlike the Philadelphia case, in the present case, GE never presented the false timecards to the Government representing them to be true."

Mr. WILLARD. Well, this involves slightly a different issue, Mr. Chairman. That is the issue of whether, as apparently Mr. Gravitt's attorney claimed, you could go back to each of the 60,000 timecards that had been altered, and get a $2,000 forfeiture for each altered timecard even though the timecards themselves were not submitted to the Government as part of the claim.

In Philadelphia, as I understand it, the altered timecards were submitted as part of a postaudit. Thus they were directly submitted to the Government with the, at least, implicit representation that they were true. Whereas here, by the time they were submitted to the Government they had already reported that there was a possibility they had been altered. So there was not a submission of the timecards to the Government as part of a scheme or effort to obtain overpayments.

Mr. GLICKMAN. Is one of the issues in the pending litigation, when you are dealing with the propriety of the settlement and the adequacy of it, of this particular issue?

Mr. WILLARD. The one we have just been talking about? I assume it will be an issue, Mr. Chairman. And if I could just add, this is an

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issue that came up when I appeared a couple of weeks ago on the proposed False Claims Act amendment.

I know Mr. Kindness was asking questions to the effect of whether it was fair to increase the forfeiture amount from $2,000 to $5,000 or $10,000. The administration has proposed increasing it $5,000, and others are proposing increasing it to $10,000. And he pointed out, and it is true, that this fixed statutory forfeiture is totally apart from any damage suffered by the Government.

And so, every false claim that is submitted to the Government may be punished by a forfeiture even if the Government is not damaged. So the False Claims Act is a very strong statute even at its present level. But it could be argued that it would be inappropriate to use the statute to assess a penalty, in a case where there is no actual loss to the Government Mr. Gravitt's lawyer suggested that the Government could recover $36 to $48 million by taking each timecard prepared by their machine shop over a multiyear period and charging $2,000 for every timecard even though they were never actually submitted to the Government.

Mr. GLICKMAN. I may have some questions in writing for you on this, but I am going to move on because I know that my colleagues will have some questions, and we will take another round here.

What is your policy regarding global settlement generally, the Department policy?

Mr. WILLARD. Well, Mr. Chairman, generally this comes up on the criminal side because normally the criminal prosecution moves ahead of the civil recovery.

In fact it is quite common for us, as in this *Gravitt* case, to stay a civil case and not file it or stay it until a criminal investigation and prosecution can be completed. This is done for a variety of reasons, among them, so that civil discovery will not interfere with the ability of the criminal prosecutors to do their investigation and also because if a criminal conviction is obtained, it can have collateral. estoppel effect in later civil litigation.

So for that reason, the issue of a global settlement would normally come up in the context of a criminal plea bargain and that of course is not done under the Civil Division's authority. What will happen is if they negotiate a plea bargain in which the defendant wants to settle everything at once—end all litigation, both criminal as well as civil—we will then be asked to consider the civil components of a global settlement.

Mr. GLICKMAN. But going back to the *Gravitt* case, would the Civil Division be brought in in that case?

Mr. WILLARD. As I understand what happened in the *Gravitt* case, the criminal people declined to prosecute and in that case of course there is no global settlement because there is no settlement of the criminal side. Instead they said that this case is not a case that they were going to prosecute.

Mr. GLICKMAN. Not the Philadelphia case as far as global settlement.

Mr. WILLARD. That's right.

Mr. GLICKMAN. You said you don't know if that is the case.

Mr. WILLARD. I said——

Mr. GLICKMAN. You have no knowledge.

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Mr. WILLARD. I have no knowledge of that and I think I would if that had been the case.

Mr. GLICKMAN. This may be something that we can't pursue but perhaps in Criminal Division, but I am going to ask just a couple of questions on your procurement fraud unit and move it over to Mr. Frank.

Your procurement fraud unit is within the Civil Division of the Justice Department?

Mr. WILLARD. Actually the procurement fraud unit is kind of a joint task force involving the Civil Division, the Criminal Division and the Department of Defense, so it is not a separate unit within the Civil Division, but rather it is a working group which promotes the cooperative effort of civil lawyers, criminal prosecutors and Defense Department.

Mr. GLICKMAN. Well, how many people within the Civil Division budget are allocated——

Mr. WILLARD. At present we have two lawyers who spend part of their time in the fraud unit reviewing cases and referring them back to other lawyers in the Civil Division. So it's really more a clearinghouse than it is a separate unit or strike force. It reviews the matters, coordinates activity and refers them, and so any lawyer in the Civil Fraud Section of the Civil Division can end up on a defense fraud case if it is referred to that lawyer. So it is not like a separate prosecutive office. It is really more of a clearinghouse and a channel for coordination.

Mr. GLICKMAN. Two people. Well, how many does DOD have on this task force?

Mr. WILLARD. I don't know, Mr. Chairman.

Mr. GLICKMAN. Who is in charge of this task force?

Mr. WILLARD. Well, again, it is a cooperative clearinghouse. It is not a separate unit, so that each of the attorneys who participate on it report back to their own supervisors. For example, the civil lawyers who work there are supervised by civil lawyers in the Civil Division, same thing for the criminal lawyers.

Mr. GLICKMAN. Who are under you, the Assistant Attorney General? I mean, do you have any idea of how many total people are working on the task force besides the two attorneys that you have, how many people in DOD?

Mr. WILLARD. I don't know the exact number, Mr. Chairman, but again, I have to emphasize it is a clearinghouse for a lot of people who work with the unit who are not technically part of it because they refer matters to it or work on investigations, and it really it is not like, say, an organized crime strike force where everyone is a full-time employee. It is instead more of a clearinghouse so that we can work together and cooperatively on the cases and make sure things don't fall through the cracks.

Mr. GLICKMAN. My information is that between the time that this unit was formed in 1982 and the Senate authorization hearing in March 1985, this unit had obtained only 19 indictments from 6 investigations. I wonder if you might comment on that?

Mr. WILLARD. I don't know, Mr. Chairman. Again, criminal indictments would not fall under my area of responsibility.

Mr. GLICKMAN. Well, how many fraud cases has the task force handled since its formation in 1982?

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Mr. WILLARD. I don't know, Mr. Chairman. We can find out and provide that information for the record.

Mr. GLICKMAN. OK. We would like that information for the record.

[The information follows:]

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Department of Justice

STATEMENT

OF

VICTORIA TOENSING
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTE ON ADMINISTRATIVE PRACTICE AND PROCEDURE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

DEFENSE PROCUREMENT FRAUD

ON

OCTOBER 1, 1985

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Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the efforts of the Department of Justice to combat fraud in the defense procurement process. Attorney General Meese has stated that great effort must be devoted to prosecution of complex white collar fraud cases, particularly in the defense procurement area. We believe we are making substantial progress. The Department's policy is to prosecute both defense contractors and corporate employees whenever we have evidence of fraud sufficient for conviction. We intend to devote all necessary resources to achieve that goal.

Three years ago, we initiated a concentrated effort in partnership with the Defense Department to uncover and prosecute criminal activity associated with defense procurement. The setting in which that effort began posed a number of problems. Extensive and time consuming internal Department of Defense procedures slowed the referral of contract fraud allegations. There was a lack of coordination between DOD investigators and DOJ prosecutors. It was difficult to develop contract fraud prosecutions in a timely fashion. Historically, U.S. Attorneys were reluctant to commit prosecutorial resources to defense procurement cases. Even experienced prosecutors perceived these cases to be very complex, time consuming and lacking in jury appeal. And even if the case resulted in conviction the court usually gave a sentence of probation. This latter problem is not under our control and I am sorry to say has not improved.

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The Defense Procurement Fraud Unit was formed in the fall of 1982 as an integral part of the Criminal Division's Fraud Section to provide a solution to many of the problems. The Unit brings together Department of Justice prosecutors, Department of Defense attorneys, investigators and accounting staff to concentrate solely on defense procurement fraud cases. The Unit has four major responsibilities. First, it screens potential significant defense procurement fraud cases. Second, it investigates and prosecutes a portion of the nationally significant procurement fraud cases. Third, its members provide advice and guidance to U.S. Attorneys' Offices and others. Finally, the Unit establishes and coordinates policy and enforcement priorities in the defense procurement fraud area.

A major responsibility of the Unit is to provide centralized preliminary screening of defense procurement fraud matters at a very early stage, far in advance of the point at which prosecutors usually become involved in cases. 1/ For example, the Defense Contract Audit Agency (DCAA), which audits DOD contracts, routinely sends to the Unit for screening reports of suspected cost mischarging and other suspected accounting frauds. Additionally, the Unit screens significant investigative matters not originating from DCAA such as defective products, false

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1/ Screening is the process by which a prosecutor conducts a preliminary evaluation for potential criminality to focus investigative resources on those areas with prosecutive potential.

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testing certifications, and bribery and corruption in the procurement process. The Unit also screens other DOD contract fraud matters that have an estimated loss in excess of $100,000.

When the Unit receives matters for screening, little if any investigation has been done. This is quite different from most referrals in non-DOD procurement fraud cases in which a significant amount of investigative work may have been completed before a prosecutor becomes involved. The Unit is staffed with experienced procurement fraud prosecutors, investigators and DOD contract lawyers. Therefore, they are able to suggest initial investigative steps that will focus on matters with criminal potential, thus separating these issues from those which are strictly civil, contractual or accounting disputes. The screening process may reveal that mistake or inadvertence was involved in particular charges rather than fraud. This screening process avoids wasting investigative efforts on cases with minimum prosecutive interest and concentrates efforts on cases of potential criminality.

I have two charts which illustrate the changes in the process by which procurement fraud cases are referred for prosecution. Prior to the creation of the Unit both DCAA audit reports of suspected accounting fraud activity and DOD non-accounting allegations of possible criminal activity were

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referred to the DOD investigative agencies. Some of the DOD non-accounting matters were also referred to the FBI. 2/ After investigation, matters were then referred directly to the 94 U.S. Attorney's Ofiices, where they were either accepted or declined. Many times they merely languished. There was no procedural mechanism in place to focus special attention on these cases.

The second chart shows that we now have such a mechanism and how it works. The Unit receives DCAA audit reports of suspected accounting fraud at the same time that the reports are forwarded to the DOD investigative agencies. Non-accounting allegations continue to go to the DOD investigative agencies and the FBI. Both the DOD agencies and the FBI, however, refer potentially significant matters directly to the Unit for screening. At that point, the Unit may (1) accept the matter for criminal investigation and prosecution or for civil suit, (2) refer the matter to an appropriate U.S. Attorney's Office, (3) return the matter for more investigative work, or (4) decline prosecution. This system enables us to accomplish two objectives: involve prosecutors at an earlier stage of an investigation and focus special attention on the significant procurement fraud cases to assure they will receive the resources needed to pursue them.

2/ These include matters of defective products, false testing certifications, bribery and corruption.

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The Unit also investigates and prosecutes a portion of nationally significant procurement fraud cases. The significance and complexity of the cases worked actively by the Unit has increased substantially during the past year. The Unit has focused its principal effort on accounting fraud cases. Investigations of complex accounting frauds take considerable time and resources to develop to the point where decisions on prosecution can be made. Many of the Unit's cases, under investigation for some time, will reach fruition in the next several months. Others will not reach a decision point for some further period of time.

The Unit has already made a significant difference in the prosecution of defense procurement fraud cases. Comparison of today's enforcement effort with that of three years ago is revealing. Three years ago, for example, there was less than a handful of accounting fraud investigations and prosecutions involving Department of Defense contractors. There was little priority associated with accounting fraud cases. Investigative agencies and U.S. Attorneys were reluctant to commit resources to these matters.

As a direct result of the Unit's emphasis on accounting fraud cases, they are now an area of high priority in federal law enforcement. The Unit and Fraud Section attorneys have successfully prosecuted three such cases in the past 18 months.

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These include: (1) United States v. Systems Architect, Inc., which was a landmark conviction after trial of a complex mischarging case and the first such case in which high corporate officials were indicted and prosecuted; (2) United States v. Sperry Corp., a conviction of a major defense contractor for labor mischarging; and (3) United States v. Automation Services, Inc., the first case in which a "second tier" subcontractor was criminally convicted for labor mischarging.

Unit and Fraud Section attorneys are actively investigating a number of major defense contractors for allegations of cost mischarging or other accounting frauds.

I noted before that U.S. Attorneys had been reluctant to devote resources to prosecute these cases. As a result of the Unit's leadership, U.S. Attorneys throughout the country now view procurement fraud cases as a priority area for prosecution. For example, the Philadelphia U.S. Attorney's Office convicted General Electric on May 13, 1985 of 106 counts of false claims and false statements. The same office also indicted four G.E. managers in the same investigation. One was found guilty at trial and one pleaded guilty; two are awaiting trial. Leadership impact can also be seen in the development of defense procurement specialists in U.S. Attorneys' Offices throughout the country.

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Some examples of other types of defense procurement fraud prosecuted by the Unit and Fraud Section attorneys are: (1) the recent conviction of GTE Government Systems Corporation (GTE-GSC) and the pending prosecution of a GTE-GSC vice president, a marketing manager and a consultant for illegally converting classified DOD budgetary and planning documents; (2) the conviction of Davey Compressor Company and its former vice president for falsely inflating spare part invoices; (3) the prosecution of the overseas commissary cases; (4) the prosecution of One Stop Motor Parts, Inc., its president and two officials in a nationwide scheme for falsely inflating spare part invoices; (5) the continuing investigation of widespread bribery, kickbacks and corruption at the Defense Industrial Supply Center in Philadelphia, which has resulted in 20 convictions to date involving more than $220,000 in bribes and kickbacks in contracts totalling $4.7 million; and (6) the recent conviction of Harold R. Heeszel, Jr., a government contracting official, for accepting gratuities in excess of $11,500 in connection with Navy contracts in Japan. These cases are more fully described in the information sheet I have provided entitled "Defense Procurement Fraud Unit."

During the past three years, the efforts of the Unit and Fraud Section have resulted in 34 indictments and criminal informations filed against 36 individuals and 10 corporations. A total of 31 individuals were convicted; four have not yet been

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tried. Judges gave only nine prison sentences. Fifteen received no prison time whatever. Seven have yet to be sentenced. All ten corporations were either convicted at trial or pleaded guilty. Unit and Fraud Section attorneys are actively involved in directing approximately 25 investigations of procurement fraud. In addition, the Unit has under review 80 matters that are at the preliminary screening stage. These numbers do not include any cases prosecuted, investigated or screened by United States Attorneys Offices. 3/

The Department of Defense Inspector General has advised Congress that 45 of the top 100 Department of Defense contractors are under criminal investigation. Unit and Fraud Section attorneys are actively involved in directing the investigation and prosecution of 12 cases involving 9 of these contractors. The Unit also has under review an additional 23 investigative matters involving 14 of these contractors.

The Unit's numbers regarding the top 100 contractors do not include any cases under the active direction or review of the United States Attorneys, nor any investigations in their initial stages that have had little or no contact with a prosecutor.

3/ The United States Attorneys Offices screen cases which do not meet the Unit's criteria, e.g. cases in which the estimated losses do not exceed $100,000. There are also cases in the United States Attorneys' Offices which were brought to them before the Unit's centralized screening function was placed in operation.

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The nature of these types of investigations is that often the underlying conduct will not prove to be criminal in nature, but the result of accident, mistake, negligence or differing interpretations of contract provisions and accounting standards. These investigations often take substantial period of time before that determination can be made.

The Unit and Fraud Section caseload is growing at a steady rate. However, it would be a serious error to measure the Defense Procurement Unit's impact by the volume of its own caseload. The Unit has been a leader in developing procurement fraud enforcement policy and in establishing prosecutive priorities. It has been instrumental in training investigators and Assistant United States Attorneys. The Unit has assisted materially in establishing lines of communication between U.S. Attorneys Offices and components of the Defense Department. It has provided technical advice to prosecutors throughout the country and thereby had an impact on the quality and quantity of cases brought by U.S. Attorneys Offices. Its record of accomplishment is impressive.

I would like to return to the question of statistics for a moment to address an issue that may be of concern to you. Recently, misleading reports circulated to the effect that more than 400 procurement fraud cases had been referred by the Defense Department to the Unit for prosecutive action. That is simply incorrect. The number "400" included cases already prosecuted,

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cases awaiting prosecutive action, matters that have been brought to prosecutors for preliminary screening only and matters brought to the Unit's attention for informational purposes only. In fact, a majority of the 400 matters brought to the Unit's attention were for informational purposes only.

This incident, however, led us to examine, along with our colleagues at the Defense Department, the manner in which we account for our respective caseloads and how we use the key term "referral." We discovered that DOD and DOJ had been using the term "referral" to describe completely different events in the case development process. The term "referral" was understood by some to describe all matters brought to the Unit's attention for mere informational purposes. It was used by DOD to describe each matter investigators brought to the Unit for screening where little or no investigative work had been done. DOJ had been traditionally defining "referral" as a case which had been substantially investigated or which had been brought before a grand jury. This created confusion about the number of matters in the advanced stage of investigation or awaiting prosecutive action.

We have met with the Department of Defense and agreed on a common definition of "referral." That term is now defined for statistical and tracking purposes to mean "referral for screening." The Department of Justice Fraud and Corruption

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Tracking (FACT) System requires the completion of a FACT form for each investigation of government fraud, official corruption or theft of government property that is "referred" to the FBI or to a Department of Justice attorney for a preliminary prosecutive opinion.

A "referral" to the Unit occurs when the Unit screens a matter and renders one of the following prosecutive opinions: (1) the Unit accepts the matter for criminal prosecution (that is, grand jury investigation or other further investigation under the direction of a prosecutor) or for civil action; (2) the Unit refers the matter to an appropriate U.S. Attorney's Office; (3) the Unit returns the matter for more investigation; or (4) the Unit declines prosecution. Information merely forwarded to the Unit without a specific request for a prosecutive decision will not constitute a referral.

The above definition of "referral" for statistical and tracking purposes includes many situations in which little or no investigative work will have been accomplished at the time the Unit renders a preliminary prosecutive opinion. Therefore, the number of "referrals" for screening does not result in a statistic that reflects the number of cases at or near prosecution. We are hopeful that this refinement in how we keep statistics will eliminate unfortunate misunderstandings such as those which occurred recently.

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The Attorney General recently announced an eight bill Anti-Fraud Enforcement Initiative to strengthen our ability to attack fraud against the government. The eight bills which make up this anti-fraud legislative package would give the Department of Justice important and, in some cases, long overdue weapons with which to deter fraud and bribery in connection with federal programs including Department of Defense programs.

These bills would: (1) make several changes in the False Claims Act to clarify ambiguities which have developed in case law and otherwise improve the government's ability to investigate and prosecute fraud cases and collect judgments; (2) establish an administrative mechanism for civil prosecution of claims under $100,000; (3) provide that suits brought to challenge the award of a government contract be heard exclusively in the Claims Court, a forum with great experience in dealing with government contracts; (4) permit the government to void contracts and grants tainted by bribery and allow the government to recover up to ten times the amount of any bribe; (5) aid investigative efforts by permitting Department of Justice attorneys investigating civil False Claims Act cases to gain access to material presented to a grand jury in related criminal prosecutions; (6) clarify DOD auditors' right of access and provide them with the necessary tools to subpoena the books and records of a contractor; make non-reimbursable legal fees of a DOD contractor; and empower the

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Court to assess the costs of investigation and prosecution upon conviction; (7) replace current provisions relating to computer offenses with a more appropriate and effective set of computer crime laws; and (8) permit the Attorney General to retain private counsel to aid in the collection of debts owed the United States.

Let me point out that there are limits to what the criminal justice system can do. Criminal prosecutions provide one important weapon for ensuring integrity in the procurement process. But a criminal prosecution can be used only where fraudulent intent or corruption can be proved beyond a reasonable doubt. In the vast majority of cases of procurement waste or abuse - fraud either is not present or cannot be proven. Many of the problems involving defense contractors do not involve issues of fraud -- for example, purchasing equipment not needed or used, or purchasing equipment in uneconomical quantities, resulting in outrageous prices.

In these instances, integrity in the procurement system can be achieved through other tools: effective contract procedures, internal controls, and vigorous use of the suspension and debarment process.

It is also important that the public understands that there will be situations where constitutional rights will interfere with prosecutions that include all guilty persons. For example, when an auditor finds that something is wrong with the books of a

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corporation and the only information we have is that which is on paper, e.g., there are two sets of books, we can not haul that bookkeeper into the grand jury and force him or her to tell us why there are two sets of figures. The Fifth Amendment protects each of us against self-incrimination. So it usually turns out that the bookkeeper's attorney comes in and says, "You give immunity and the bookkeeper will talk." That is how white collar, i.e. paper trail, cases are worked. These are not bank robberies or crimes of violence where the very fact of committing the criminal act usually assumes the requisite intent or knowledge for prosecution. We have made a choice in this society of freedom and protection from excessive governmental intrusion that it is better to have the Bill of Rights than to get all those guilty of committing crimes. I am not ready to change that; I am sure this Committee is also not. Therefore, we commit ourselves to pursue vigorously these offenders, and also that we will do so without violating the Constitution.

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Defense Procurement Fraud Unit

Why was the Defense Procurement Fraud Unit Established?

The Department of Justice's concern about procurement fraud is not new. In the mid-1970s, the Fraud Section of the Criminal Division successfully prosecuted cases involving bribery in the Army-Air Force Exchange, fraudulent supplying of adulterated and unwholesome meat, falsifying of test data and mischarging of labor costs in government contracts. 1/ From these experiences, the Department became aware of the problems hampering effective investigation and prosecution of procurement fraud. They included: (1) extensive and time consuming internal Department of Defense (DOD) procedures prior to the referral of criminal fraud allegations; (2) lack of communication among DOD auditors, investigators and prosecutors; (3) lack of coordination among the military services; (4) long lead time for investigators and prosecutors to learn government contract law and procurement practices; (5) lack of systematic coordination among officials in the procurement process, investigators, and attorneys; (6) U.S.

1/ Examples of some of these special prosecutive efforts were: (1) Grand jury investigations in Massachusetts, Texas and Florida in 1975-1977, which led to the conviction of major suppliers of meat and fish to DOD for supplying substituted products and corrupting military inspectors; (2) Semi-conductor computer part fraud investigations which led to the conviction of National Semiconductor Corporation in San Francisco; and (3) Accounting mischarging cases, the subject of various unsuccessful investigations for years, successfully prosecuted in two districts including the conviction of Bolt Beranek and Newman in the District of Massachusetts.

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Attorneys' reluctance to commit prosecutorial resources to complex, time consuming cases perceived as lacking in jury appeal; and (7) no clearly defined Department of Justice nationwide enforcement program establishing procurement fraud as a priority and providing guidance, expertise and support to investigators and U.S. Attorneys.

The Department of Justice's concern with the difficulties in working on defense procurement cases was discussed with Congress on more than one occasion. For example, in June 1978, Deputy Assistant Attorney General John Keeney testified in hearings before the Senate Subcommittee on Governmental Efficiency that this area was massive and complex requiring the need to make more efficient use of audit and investigative resources. He also stated that the Department of Justice would work closely with the Department of Defense to expedite criminal referral of the cases.

By the summer of 1982, it was decided a permanent institutional framework was needed to develop the necessary expertise and understanding on the part of Department of Justice attorneys and prosecutors in procurement practices and government contract law. As a result, in August 1982, Attorney General Smith and Secretary of Defense Weinberger announced the formation of the Defense Procurement Fraud Unit as an integral part of the Criminal Division's Fraud Section. The Unit is an attempt to cut through many of the problems associated with both the large and the small procurement fraud cases. This task force brings

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together Justice prosecutors, Defense Department attorneys, investigators and accounting staff.

What are the Unit's Responsibilities?

The Unit has four major responsibilities. First, it screens potential significant defense procurement fraud cases. Second, it investigates and prosecutes a portion of the nationally significant procurement fraud cases. Third, its members provide advice and guidance to U.S. Attorneys' Offices and others. Finally, the Unit establishes and coordinates policy and enforcement priorities in the defense procurement fraud area.

1. Screening Matters

The Unit provides centralized preliminary screening 2/ of defense procurement fraud matters at a very early stage, far in advance of the point at which prosecutors usually become involved in cases. This includes audit reports involving suspected cost mischarging and other accounting fraud matters generated by the Defense Contract Audit Agency (DCAA). Additionally, the Unit screens significant investigative matters not originating from DCAA such as defective products and false testing certifications. The Unit also screens other DOD contract fraud matters with an

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2/ Screening is a preliminary evaluation for potential criminality so that we can focus investigative resources on those areas with prosecutive potential.

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estimated loss in excess of $100,000. Finally, the Unit screens bribery and other corruption matters regarding widespread corruption at a specific facility or matters involving senior government contract officials. These investigative matters usually contain preliminary information developed from a source, such as government contracting officers, inspectors or disgruntled employees.

When the Unit receives matters for screening, little if any investigative work has been done. This is quite different from most referrals in non-DOD procurement fraud cases in which a significant amount of investigative work has been completed before a prosecutor becomes involved.

If these matters contain sufficient information when received, the Unit can determine soon thereafter whether to: accept the matter for criminal prosecution or civil suit; refer the matter to an appropriate U.S. Attorney's Office; or decline prosecution. If the matters do not contain sufficient information on which to base an initial decision, the Unit will direct the investigative agency to conduct further investigation to obtain this information.

The Unit is staffed with experienced procurement fraud prosecutors, investigators and DOD contract lawyers. Therefore, they are able to suggest initial investigative steps that will

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focus on matters with criminal potential, thus separating issues which are strictly civil, contractual or accounting disputes.

The screening process may reveal that the contractor has overcharged the government as a result of mistake or inadvertance, rather than as a result of fraud. This screening process avoids wasting investigative efforts on cases with minimal prosecutive interest and concentrates efforts on cases of potential criminality.

For example, an audit report may state that a defense contractor's employees charged their time to an overhead research and development task when they were actually working on a contract which had reached its cost ceiling. Screening may disclose that the government contracting officer approved this shift in labor because modifications or change orders to the contract had not yet been formalized. In another instance, a contractor may state in his pricing proposal to the government that it will cost him $1,000,000 to purchase metal from a subcontractor. A subsequent audit may disclose the contractor only paid $900,000 for the metal. Screening may disclose that difference in price resulted from a subsequent reduction in the price of the metal which the subcontractor passed on to the prime contractor.

On DCAA matters in which a U.S. Attorney's Office makes prosecutive decisions, the Unit screens the matter, recommends investigative actions, and notifies the appropriate U.S.

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Attorney's Office of the audit report and suggested investigative steps. On significant non-DCAA matters, the Unit advises the investigating agent which information should be developed before the case is assigned to a U.S. Attorney's Office. The decision to keep the matter or forward it to a U.S. Attorney's Office depends on the nature of the matter and the resources and technical expertise of the U.S. Attorney's Office.

2. Investigation and Prosecution

The Unit also investigates and prosecutes a portion of nationally significant procurement fraud cases. It is the Unit's practice to contact U.S. Attorneys and work with them in cases where the Unit will take an active prosecutive role. The Unit and Fraud Section attorneys work many of these cases with prosecutors from the U.S. Attorneys' Offices in a joint effort. In other instances, the Unit and Fraud Section attorneys will work cases with the U.S. Attorneys' Offices providing a more limited role.

The significance and complexity of the cases actively worked by the Unit has increased substantially during the past year. For example, the Unit has focused effort on accounting fraud cases. This is a result of the refinement of the process by which matters are brought to the Unit's attention and the improvement of the Unit's working relationship with U.S. Attorneys. Investigations of complex accounting fraud cases,

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such as cost mischarging, take considerable time to develop to the point where decisions on prosecution can be made. Consequently, many of the Unit's cases have been under investigation for some time. Some of these will reach fruition in the next several months, but others will not reach a decision point for some further period of time.

During the past three years, the efforts of the Unit and Fraud Section have resulted in 34 indictments and criminal informations against 36 individuals and 10 corporations. A total of 31 individuals were convicted; four have not yet been tried. Judges sentenced only nine to prison sentences. Fifteen defendants received no prison time whatever. Seven have not been sentenced. Ten corporations were also convicted. Unit and Fraud Section attorneys are actively involved in directing approximately 25 investigations of procurement fraud. In addition, the Unit has under review 80 matters that are at the preliminary screening stage. These numbers do not include any cases prosecuted by United States Attorney's Offices. 3/

The Department of Defense Inspector General has advised Congress that 45 of the top 100 Department of Defense contractors are under criminal investigation. The Unit and Fraud Section

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3/ The United States Attorneys' Offices screen cases which do not meet the Unit's criteria, e.g. cases in which the estimated losses do not exceed $100,000. There are also cases in the United States Attorneys' Offices which were brought to them before the Unit's centralized screening function was placed in operation.

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attorneys are actively involved in directing the investigation and prosecution of 12 cases involving 9 of those contractors. The Unit also has under review an additional 23 matters involving 14 of those contractors.

The Unit's numbers regarding the top 100 contractors do not include any cases under the active direction or review of the United States Attorneys, nor any investigations in their initial stages that have had little or no contact with a prosecutor.

The nature of these types of investigations is that often the underlying conduct will not prove to be criminal in nature, but the result of accident, mistake, negligence or differing interpretations of contractual and accounting issues. These investigations often take a substantial period of time before that determination can be made.

3. Advice and Guidance

The Unit provides technical advice and prosecutorial guidance to U.S. Attorneys' Offices throughout the country. Such guidance includes legal research on contractual issues, sample legal pleadings, advice on investigative and prosecutive strategy, and coordination of U.S. Attorneys and DOD procurement officials.

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Unit attorneys and investigators instruct at procurement fraud training sessions and seminars attended by prosecutors, contract lawyers, accountants and investigators. This training covers a wide variety of matters relating to fraud and the procurement process.

In addition to providing advice and guidance to U.S. Attorneys' Offices, the Fraud Unit coordinates with other agencies, such as NASA, to exchange informally and to gather information on investigative and prosecutive expertise in contract fraud cases. One example is learning how other agencies use computer audit programs to detect mischarging patterns. In addition, expertise developed by the Unit is used by Fraud Section attorneys to prosecute non-DOD cases.

4. Establishment and Coordination of Policy and Enforcement Priorities

The Unit is heavily involved in developing policy on procurement fraud matters. This includes establishing enforcement priorities, recommending proposed legislation and coordinating suspension and debarment issues with the criminal process.

The Unit is instrumental in improving the communication and coordination between the Justice Department and the DOD agencies. It also serves as a vehicle for information to be exchanged between the five investigative organizations (the Air Force

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Office of Special Investigations, the Naval Investigative Service, the Army's Criminal Investigative Command, the Defense Criminal Investigative Service and the Federal Bureau of Investigation), thereby expediting the assignment of investigative manpower. In addition, the Unit has served the same function with respect to audit support for investigative and prosecutive efforts.

What are the Unit's Priorities on Cases?

The Unit provides leadership in designating priority areas for investigation and prosecution. These priorities include: (1) defective products; (2) labor mischarging; (3) defective pricing; and (4) corruption.

Defective products cases occur when a contractor knowingly furnishes products that do not meet the quality assurance and inspection requirements of a government contract. The contractor then presents invoices and certificates stating that the items furnished conform to the contract requirement or the contractor furnishes test certifications which falsely show that the items were tested in accordance with the contract specification. The types of defective product violations vary tremendously. Prosecutions by Department of Justice and U.S. Attorneys have involved items such as defective parachute cords, faulty jet ejection seat valves, fabricated certificates verifying the chemical composition and physical strengths of metals, and false certifications of microchip testings.

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Labor mischarging occurs when a contractor incurs labor costs on a contract or account (e.g., independent research and development, or bid and proposal) for which he cannot get more money from the government and, therefore, shifts these labor costs to another contract or account for which he will receive reimbursement. The first contract is often a fixed price contract or cost plus contract which has overrun its contractual ceiling. Several investigations have been conducted where contractors shift labor costs on these contracts to cost plus contracts under ceiling about the time the first contract runs out of money. We have also seen instances where these overrun costs are shifted to overhead accounts for which the contractor is reimbursed by the government.

Another area of accounting fraud is commonly referred to as defective pricing. On any negotiated contract in excess of $100,000, as opposed to a contract competitively awarded on price alone, a Defense Department contractor must furnish the government cost or pricing data and certify that to the best of his knowledge and belief the cost or pricing data submitted is accurate, complete, and current. Fraud occurs when the contractor submits to the government negotiators falsified or forged vendor quotes to support his material costs or fraudulently misstates his past experience which results in inflating the number of labor hours and labor costs that will be required to perform a particular task. By doing this, the

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contractor is able to negotiate a higher contract price than he would otherwise be entitled to.

Our emphasis on corruption includes cases involving the offering and accepting of bribes and substantial gratuities made by contractors to government contract officials. This type of fraud goes to the very heart of and threatens the integrity of the government procurement process. It results in the government receiving potentially life threatening defective products and paying more for a product than it should pay. It also results in honest contractors being excluded from the bidding process or foregoing participation in government contracts because they will not engage in illegal activities.

What are the Unit's Accomplishments?

A major accomplishment of the Unit is providing a multi-agency forum in which the Department of Justice and the Department of Defense agencies work together to screen, develop and prosecute defense procurement fraud cases more effectively. This has been accomplished not only through the technical expertise and training which the Unit provides, but also through the improved coordination and communication between the Department of Defense agencies, and the Department of Justice and FBI. The Unit has assisted in marshalling the Department of Defense's sizeable investigative and audit resources to aid in the effective development of nationwide fraud cases. It has also made a major stride in focusing nationwide attention on the importance of defense procurement fraud enforcement.

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The Unit has already made a significant difference in the prosecution of defense procurement fraud cases. A striking comparison can be made between the situation today and three years ago. Three years ago, for example, there was less than a handful of accounting fraud investigations and prosecutions involving Department of Defense contractors. There was little priority associated with accounting fraud cases. Investigative agencies and U.S. Attorneys were reluctant to commit resources to these matters.

As a direct result of the Unit's emphasis on accounting fraud cases, they are now an area of high priority in federal law enforcement. The Unit and Fraud Section attorneys have successfully prosecuted three such cases in the past 18 months. These include United States v. Systems Architect, Inc., United States v. Sperry Corp., and United States v. Automation Services, Inc. Moreover, the Procurement Fraud Unit and Fraud Section attorneys are actively investigating a number of major defense contractors for allegations of cost mischarging or other accounting frauds.

United States v. George S. Pan, Karen Pan, and Systems Architect Inc. is the first successful trial of a complex labor mischarging case in the past few years. It is also the first such case in which high corporate officials were indicted and convicted. The case involved the mischarging of labor costs in several defense contracts.

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George and Karen Pan, the President and Assistant Treasurer, and Systems Architect Inc. (SAI) engaged in a scheme to defraud the United States by mischarging direct labor costs. Through the alteration of employees' time sheets and company's books and records, they caused $440,000 in direct labor costs to be mischarged to overhead. This resulted in inflation of overhead rates and overpayment by the government of overhead costs on cost reimbursable contracts.

All defendants were convicted. However, the president of SAI, the only one sentenced to prison, received a one-year sentence with all but 30 days suspended. The assistant treasurer received probation and the corporation was fined $65,000. The Civil Division is seeking approximately $2,100,000 in damages and is also seeking forfeitures.

United States v. Sperry Corp. is a recent mischarging case involving a major defense contractor. The corporation pleaded guilty to fraudulent mischarging of labor costs in an Air Force proposal for a Missile X (MX) weapons system contract.

Sperry engaged in a fraudulent scheme to mischarge labor costs incurred on an Air Force MX proposal contract to the Air Force Launch Control Systems (ALCS) contract. When it appeared that MX bid and proposal labor costs would exceed the maximum costs that the government had agreed could be charged, employee time cards were falsified and certified that work performed on the MX proposal contract was incurred on the ALCS contract. As a

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result, false progress payments requests were submitted and Sperry was able to recover considerable labor costs which were not legally recoverable.

Sperry Corporation pleaded guilty to fraudulent mischarging of labor costs and was required to pay double damages of $650,000, plus $167,740.86 in interest, and $30,000 in criminal fines. Sperry was also forced to absorb $300,000 in attorneys' fees, which it otherwise could have charged to the government under its existing contract. In addition to the civil and criminal penalties and repayment of losses to the government, Sperry was required to take steps to insure the integrity of its labor accounting systems to prevent the recurrence of this type of fraud.

The United States v. Automation Services, Inc. case represented the first time that a "second tier" subcontractor was criminally charged in a DOD fraud matter. The company pleaded guilty to labor mischarging in connection with a subcontract it had with IBM for the construction of electrical cables for aircraft being manufactured by Boeing Corporation for the Air Force.

Automation Services, Inc. (ASI) had engaged in a fraudulent scheme to mischarge employee time to IBM under a time and materials subcontract. For more than a year, ASI management staff directed the systematic destruction, alteration, erasure

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and fabrication of employee time cards, resulting in billing to IBM of thousands of hours of labor expended in other contracts. The contracts selected for mischarging by ASI were ones that were losing money. ASI's fraudulently inflated billings to IBM were passed on to Boeing, and in turn to the United States.

As part of ASI's plea agreement, ASI was assessed $11,000 in criminal fines and entered into a civil settlement agreeing to pay $180,000 in civil recovery.

Because of the Unit's efforts in the accounting fraud area, U.S. Attorneys around the country are now pursuing these cases as a priority area for prosecution. Investigative agencies have devoted considerable resources to these cases, and auditors, investigators and prosecutors are now being trained in developing these matters for prosecution. The results can be seen in the recent conviction of General Electric by the U.S. Attorney's Office in Philadelphia on May 13, 1985, and the subsequent indictment of four General Electric managers. One was found guilty at trial and one pleaded guilty; two are awaiting trial.

Some other examples of the impact of the Unit's concentration and expertise in defense procurement fraud cases are: (1) the recent conviction of GTE Government Systems Corporation and the pending prosecution of a vice president, a marketing manager and a consultant for illegally converting classified DOD budgetary and planning documents; (2) the

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successful prosecution of Davey Compressor Company and its former vice president for falsely inflating spare part invoices; (3) the prosecution of the overseas commissary cases; (4) the prosecution of One Stop Motor Parts, Inc., its president and two officials in a nationwide scheme for falsely inflating spare part invoices; (5) the prosecution of kickbacks and bribery in the Defense Industrial Supply Center cases; and (6) the recent conviction of Harold R. Heeszel, Jr. for accepting gratuities from Japanese contractors.

On September 12, 1985, GTE Government Systems Corporation (GTE), a major defense contractor, pleaded guilty to conspiracy to illegally convert classified and proprietary Pentagon documents. The company admitted gaining unauthorized access to the documents, which dealt with the budget and planning for electronic warfare programs, and using the documents to prepare bids and proposals for contracts with the Defense Department. GTE was sentenced to the maximum $10,000 fine. As part of a separate agreement with the Department of Defense, GTE agreed to pay the Government a sum of $580,000 which includes investigation costs.

In connection with the same investigation, a GTE vice president, a former GTE marketing manager and a GTE consultant were indicted on September 10, 1985 by a grand jury in the Eastern District of Virginia. The indictment charged that Bernie Zettl, the consultant, conspired to supply GTE with the unauthorized Pentagon documents. Walter R. Edgington, the vice

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president, and Robert R. Carter, the former marketing manager, were charged with participating in the conspiracy to defraud the federal procurement process.

In October 1983, Davey Compressor Company and its former vice president, John D. Falso, pleaded guilty to filing false claims against the United States. The company falsely inflated the prices of spare parts that it had received from suppliers and charged the inflated prices to the Air Force. In so doing the company supplied the government with forged and altered documents showing the inflated prices. The total amount of the overcharges revealed by the investigation was $1,704,429. The company paid a total of $3,000,000 in criminal fines, civil damages and penalties. Mr. Falso was sentenced to two years imprisonment.

The commissary cases, United States v. Shirley Hall and United States v. Nicholas Lynch, centered on forged invoices at U.S. Army commissaries overseas. Congressional hearings identified systemic problems. The situations required an immediate response and it was highly unlikely that any U.S. Attorney's Office would have handled the cases. The Unit investigated and indicted these cases in two different venues. Upon conviction after trial, Hall received a 3 year suspended sentence, 1400 hours community service and a $5,000 fine. Lynch has not yet been brought to trial.

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In the One Stop Motor Parts case, a series of investigations throughout the country during a ten year period had been declined by U.S. Attorneys' Offices which could only focus on the fraud in their individual districts. The prosecution of this case, which was handled by the Fraud Section and a U.S. Attorney's Office in conjunction with the Unit, focused on a scheme directed overall by One Stop's principals to defraud the Air Force at numerous bases throughout the country. One Stop, its President, and certain area managers were found guilty of scheming to overcharge the Air Force for vehicle replacement parts by submitting fraudulently inflated sales slips misrepresenting parts delivered. The case would not have been prosecuted except from the national perspective of an overall problem in multiple venues. The president of the company received a 3 year sentence, one manager was incarcerated for 6 months and the other received probation. All three individuals received fines.

Bribery and corruption cases out of the Defense Industrial Supply Center (DISC) in Philadelphia had multiple venues and did not initially present a systemic problem at the center when viewed only from a specific venue or from the perspective of an individual U.S. Attorney's Office. The Unit, however, was able to view the problem in its entirety which resulted in it becoming a priority area, and promptly devoted the necessary resources. These cases concern the bribing of government buyers at the Defense Industrial Supply Center in exchange for the buyers providing bid information on competitors for defense contracts.

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To date, four corporations and seven corporate officers/owners charged with bribing DISC buyers have either pleaded guilty or been convicted after trial. Eight DISC buyers have been convicted, through guilty pleas or trial, of various felonies arising out of their receipt of money from several government contractors. In addition, a related case resulted in a contractor employee pleading guilty to receiving kickbacks from a subcontractor in connection with government contracts. The successful prosecutions include convictions of contractors such as Delsea Fasteners, Inc. and Standard Air Parts. The DISC cases involved more than $220,000 in bribes and kickbacks on more than $4.7 million in contracts. In addition, several other companies and individuals are currently under investigation.

Another example of the Unit's emphasis on fraud and corruption is the recent prosecution of Harold R. Heeszel, Jr., a former contracting officer for the U.S. Naval Supply Depot in Yokosuka, Japan. Heeszel was convicted of conspiring with officials of several Japanese ship repair contractors, who as part of the conspiracy gave him numerous gifts, including over $11,500 in cash. At that time (1978-1982), Heeszel was responsible for awarding Master Ship Repair Contracts to the contractors. He was sentenced on September 16, 1985 to two years in prison and a $10,000 fine.

Another positive result has been a dramatic shift in attitude on the part of many defense contractors. For example, three years ago many defense contractors and their counsel argued

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that mischarging was not really a crime. Today, contractors understand that such cases will be vigorously investigated and prosecuted. As a result, many have changed their perceptions and have taken steps to insure the integrity of their accounting systems and to prevent mischarging on government contracts. Some of these steps include: instituting tighter internal controls, fraud awareness programs, management directives, surprise audits, hotlines to report irregularities to corporate counsel and increased disciplinary action. We believe these changes are the direct result of the Justice Department and the Defense Department's increased emphasis on procurement fraud.

There are limits to what the criminal justice system can do to improve the defense procurement process. Criminal prosecutions provide one important means of creating integrity in that process. But a criminal prosecution can be used only where fraudulent intent can be proved beyond a reasonable doubt. In the vast majority of cases of procurement waste or abuse -- fraud is not present. Many of the problems reported in the media involving defense contractors do not involve issues of fraud -- for example, the purchase of tools not needed or used; or the purchase of equipment in uneconomical quantities resulting in outrageous prices.

How is the Unit Staffed?

The current staffing is the result of a gradual growth of the Unit since August 1982. The Unit was transferred from its

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temporary location in the District of Columbia to Alexandria, Virginia in May 1983.

The present staff includes: five Criminal Division trial attorneys; an Assistant U.S. Attorney from the Eastern District of Virginia; two Department of Justice Civil Division attorneys (part-time); attorneys on detail from the Army (1), Navy (1), Air Force (1) and Defense Logistics Agency (1); investigators on detail from the Defense Criminal Investigative Service (1), Air Force Office of Special Investigations (1), Naval Investigative Service (1), Army Criminal Investigative Command (1), and FBI (1); an auditor from the Defense Contract Audit Agency; a Criminal Division paralegal; a Criminal Division secretary and a Defense Department secretary.

Department of Justice attorneys from both the Fraud Section and the Civil Division can be assigned to particular Unit cases requiring additional resources. For example, currently six Fraud Section attorneys are spending a major portion of their time on matters involving major defense contractors. Also, we are able to draw on the various defense agencies and the FBI for additional investigative support.

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Mr. GLICKMAN. How many cases referred through this task force has resulted in suits filed and judgments rendered or settled?

Mr. WILLARD. Again, we would have to provide that for the record.

Mr. GLICKMAN. OK.

[The information follows:]

LIST OF UNIT AND FRAUD SECTION DOD PROCUREMENT FRAUD CASES RESULTING IN INDICTMENT OR CONVICTION

Case	Date of indictment or information	Type of fraud	Disposition	Sentence
U.S. v. Chester J. Karpowicz (E.D. Michigan).	Dec. 18, 1985	Embezzlement and tax evasion in connection with DOD Overseas School System.	Information (plea)	Not yet sentenced.
U.S. v. Fred D. Hawley [1] and Gary Edward Fleming (N.D. California).	Dec. 6, 1985	Conspiracy to defraud, false certification of test results.	Conviction (plea)	Do.
U.S. v. Neil Halloran [1] (N.D. California).	Dec. 3, 1985	Conspiracy to defraud, false certification of test results.	Conviction (plea)	Do.
U.S. v. General Dynamics, James M. Beggs, Ralph E. Hawes, Jr., David L. McPherson, James C. Hansen, Jr. (C.D. California).	Dec. 2, 1985	Cost mischarging	Indictment	
U.S. v. Louis Wernovsky and Philadelphia Hardware and Supply, Inc. (E.D. Pennsylvania).	Nov. 2, 1985	Conspiracy and bribery of DISC buyer in exchange for bid information.	Conviction (plea)	Do.
U.S. v. George A. Sawyer (E.D. Virginia).	Oct. 31, 1985	False statements of former Asst. Secy. of Navy re receiving gifts and travel expenses from General Dynamics Corp. while employed with Navy.	Acquittal	
U.S. v. Michael H. Lupo [1] (N.D. California).	Oct. 10, 1985	Conspiracy to defraud, false certification of test results.	Conviction (plea)	6 months prison and 5 years probation.
U.S. v. Charles Eltzy [1] (E.D. Pennsylvania).	Oct. 9, 1985	Acceptance of bribes by Government contracting official.	Plea	Sentencing scheduled for March 6, 1986.
U.S. v. Arthur Applebaum [1] (E.D. Pennsylvania).	do	do	Indictment (plea)	Sentencing scheduled for February 6, 1986.
U.S. v. William J. Solar [1] (N.D. Ohio).	Oct. 4, 1985	Falsification of timecards and preparation of fraudulent work authorizations which resulted in overbilling on Navy contracts.	Acquittal	
U.S. v. Gould Defense [1] Systems (N.D. Ohio).	Oct. 3, 1985	False statements in connection with progress payments on Navy contracts.	Conviction (plea)	$50,000 criminal fine and $2,228,741 in civil damages and penalties.

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LIST OF UNIT AND FRAUD SECTION DOD PROCUREMENT FRAUD CASES RESULTING IN INDICTMENT OR CONVICTION—Continued

Case	Date of indictment or information	Type of fraud	Disposition	Sentence
U.S. v. GTE Government [1] Systems Corp. (E.D. Virginia).	Sept. 10, 1985	Conspiracy to defraud Federal Procurement Process—Conversion of Government documents containing classified and proprietary information.	do	$10,000 fine, separate undertaking to pay $580,000 which includes costs of investigation.
U.S. v. Settl, Carter, [1] and Edgington (E.D. Virginia).	do	do	Indictment—on appeal from pretrial rulings on classified information.	
U.S. v. Judith Ward [1] (N.D. California).	Aug. 21, 1985	Conspiracy to defraud, product substitution.	Conviction (plea)	2 years probation.
U.S. v. Richard I. Horowitz (E.D. Virginia).	July 23, 1985	False statements to Air Force Debarment and Suspension Board re providing bid information.	Conviction (trial)	3 years prison, 2 years probation and $10,000 fine.
U.S. v. White [2] (E.D. Pennsylvania).	July 20, 1985	Acceptance of briues by Govt. contracting official.	Conviction (plea)	5 years probation and $2,000 fine.
U.S. v. Jack Kligman [1] (E.D. Pennsylvania).	June 24, 1985	Acceptance of bribes and gratuities by Govt. contracting official.	do	5 years probation, $11,000 fine, 200 hours community service, and $1,425 restitution.
U.S. v. Richard E. Davis [1] (E.D. Pennsylvania).	Apr. 25, 1985	Acceptance of bribes and gratuities by Govt. contracting official.	do	5 years probation, $1,500 fine, 300 hours community service, and $2,500 restitution.
U.S. v. Booker T. Raynor, Jr. [1] (E.D. Pennsylvania).	do	Acceptance of bribes and gratuities by Govt. contracting official.	Conviction (trial)	1 year and 1 day prison and 4 years probation.
U.S. v. Herman Blank and Imperial Air Parts, Inc. (E.D. Pennsylvania).	Mar. 27, 1985	Conspiracy and bribery of DISC buyer in exchange for bid information.	Conviction (plea)	Blank (vice-pres.) received 5 years probation, $10,000 fine. Company received suspended sentence.
U.S. v. Leone Giannitti [2] Industrial Tech, Inc. (E.D. Pennsylvania).	Feb. 15, 1985	Bribery of DISC buyer in exchange for bid information.	do	Giannitti, Corporate officer received 5 years probation, $5,000 fine, 400 hours community service. Corporation received $12,500 fine.
U.S. v. Harold R. Heeszel (N.D. California).	Feb. 6, 1985	Acceptance of bribes and gratuities by Govt. contracting official.	do	2 years prison and $10,000 fine.
U.S. v. Bruce E. Ream [1] (E.D. Pennsylvania).	Jan. 30, 1985	Conspiracy to defraud—Payments of bribes to Government buyers.	do	6 months prison, 4½ years probation, and $10,000 fine.
U.S. v. Amedeo A. DiFrancesco [1] (E.D. Pennsylvania).	do	do	do	6 months prison, 4½ years probation, and $10,000 fine.
U.S. v. Anthony Iocono [1] (E.D. Pennsylvania).	Aug. 30, 1984	Conspiracy and bribery of Defense Industrial Supply Center (DISC) buyers in exchange for bid information.	do	Not yet sentenced.
U.S. v. Delsea Fasteners [1] (E.D. Pennsylvania).	do	Conspiracy and bribery of DISC buyers in exchange for bid information.	do	Do.

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LIST OF UNIT AND FRAUD SECTION DOD PROCUREMENT FRAUD CASES RESULTING IN INDICTMENT OR CONVICTION—Continued

Case	Date of indictment or information	Type of fraud	Disposition	Sentence
U.S. v. Hugh J. Connelly, Jr. (E.D. Pennsylvania).	do	Bribery of DISC buyer in exchange for bid information.	do	5 years probation, $10,000 fine, and 200 hours community service.
U.S. v. Alfred T. Stanger,[2] Jack R. Mason, Romiro Chavarri (D Connecticut).	July 17, 1984	Disclosure of bid information.	Conviction (trial—Stanger) (plea—Chavarria) (acquittal after trial—Mason).	Stanger, not yet sentenced. Chavarria, 6 months prison.
U.S. v. Roger Holland (E.D. Pennsylvania).	July 10, 1984	Accepting bribe from Govt. contractor in exchange for bid information.	Conviction (plea)	6 months work release, and 2 years probation.
U.S. v. Automation Services, Inc. (N.D. New York).	Apr. 30, 1984	Labor mischarging	Conviction and settlement (plea).	$11,000 in criminal fines and $180,000 civil settlement.
U.S. v. Barry W. Knox (E.D. Virginia).	Dec. 19, 1983	Fast pay (mail fraud)	do	3 years probation with 100 hours community service and $78,194.19 civil settlement.
U.S. v. Sperry Corp. (D. Minnesota).	December 1983	Labor mischarging	do	$650,000 in civil double damages plus $167,740.86 in interest and $30,000 in criminal fines.
U.S. v. John R. Hemberger [1] (E.D. Pennsylvania).	Nov. 22, 1983	Accepting bribe from Govt. contractor in exchange for bid information.	Conviction (plea)	3 years probation and $2,000 fine.
U.S. v. Thomas Pescatore [1] (E.D. Pennsylvania).	do	False statement before grand jury (information charged acceptance of bribe from Govt. contractors in exchange for bid information).	do	3 years probation and 50 hours/month community service.
U.S. v. Robert Lambert, Standard Air Parts, Inc. (C.D. California).	Nov. 1, 1983	Bribery of public officials and mail fraud.	Conviction (trial)	Lambert (President) 4 years prison and $208,000 in criminal fines. Corporation fined $159,000.
U.S. v. John Falso [1] (S.D. Ohio).	Oct. 7, 1983	Defective pricing of spare parts (false claims).	Conviction (plea)	2 years prison.
U.S. v. Davy Compressor [1] (S.D. Ohio).	do	do	Conviction and settlement (plea).	$100,000 in criminal fines, civil damages and penalties.
U.S. v. George S. Pan, Karen Pan Systems Architects, Inc. et al. (D. Massachusetts).	Sept. 28, 1983	Labor mischarging (mail fraud, false statements, and false claims).	Conviction (trial)	George Pan (Pres.) 1 year prison with all but 30 days suspended and 3 years probation with 20 hours community service a week, Karen Pan (Asst. Treasurer) 2 years probation. Corporation fined $65,000.
U.S. v. Dickinson T. Brent (District of Columbia).	Sept. 20, 1983	Forgery of signature of Naval officer and submission of false claims for progress payments.	do	$5,000 fine, 3 years suspended sentence, 3 years probation, 250 hours community service and $58,000 restitution.

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LIST OF UNIT AND FRAUD SECTION DOD PROCUREMENT FRAUD CASES RESULTING IN INDICTMENT OR CONVICTION—Continued

Case	Date of indictment or information	Type of fraud	Disposition	Sentence
U.S. v. Michael Milinoff (E.D. Michigan).	Aug. 29, 1983	Payment of gratuity to public official.	Conviction (plea)	2 years probation and $7,500 fine.
U.S. v. Thomas Lofgren [1] (E.D. Pennsylvania).	July 7, 1983	Receipt of bribes by Govt. buyer from Govt. contractor in exchange for bid information.	do	1 year and 1 day prison.
U.S. v. Shirley Frank Hall [1] (S.D. Texas).	Mar. 23, 1983	Forgery of commissary order forms (false statements).	Conviction (trial)	3 years suspended sentence, 5 years probation, $5,000 fine and 1,400 hours community service.
U.S. v. Nicholas Lynch [1] (S.D. Texas).	do	do	Defendant is a fugitive.	
U.S. v. One Stop Motor Parts, Inc., Robert R. Westbrook, Burton Purdy, Manuel J. Eres (N.D. Texas).	Mar. 15, 1983	Conspiracy to defraud, submission of false claims and false statements to overcharge Government in connection with supply of motor vehicle parts.	Conviction (trial)	Westbrook, President, received 3 years prison and $5,000 fine. Eres, manager, received 3 years probation and $3,000 fine. Purdy, manager, received 6 months prison, 3 years probation, and $3,000 fine.
U.S. v. Charles E. Parker (N.D. Georgia).	Mar. 1, 1983	Violation of Anti-Kickback Statute.	Conviction (plea)	2 years probation plus payment of certain costs.

[1] Related cases.
[2] These cases, Gucmith, Industrial Tech, Inc., and White, are included because they are part of the DISC cases which the Unit has been prosecuting in conjunction with the Philadelphia U.S. attorney's office. However, these cases were primarily handled by the Philadelphia U.S. attorney's office.
[3] Fraud Section responsibility ended February 1985. Case litigated by U.S. attorney's office.

Mr. GLICKMAN. And again, I would like that information with respect to suits that have been lost as well as any cases refused for prosecution. I think that is important, and we ought to have that information.

How many fraud cases are pursued by the Justice Department that do not go through the task force?

Mr. WILLARD. Oh, a great number. We receive fraud referrals from a variety of sources, inspectors general, the various agencies, from the DCAA, and from reviewing FBI reports if there is an ongoing criminal investigation. So we have a fairly large intake network of fraud referrals and we try to cast our net as broadly as we can.

Mr. GLICKMAN. Well, I would like to know, if possible, the percentage of cases that go through this task force on procurement fraud, and I assume that is defense and nondefense, as well as those that do not go through the task force. I want to get some idea of the cohesiveness of how these cases are handled. I also would like to know the percentage of cases that result in awards to the United States in these areas. I want to get a percentage of how many cases you actually handle and what your success ratio is and how you deal with it.

How were the defense fraud cases handled prior to the formation of the procurement task force?

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Mr. WILLARD. Basically in the means I described, through referrals from a variety of sources—and I am talking now about civil fraud cases—referrals from criminal investigators, from criminal prosecutors, from the inspectors general of the various departments and agencies and from any other source where we could get information about possible fraud.

Mr. GLICKMAN. Now it is my understanding that the purpose of this defense procurement fraud unit was to handle complex and nationally significant cases so as to deter fraud by defense contractors; is that correct?

Mr. WILLARD. I am not sure exactly whether that is or is not one of the stated purposes. My understanding of it is, as I indicated, that it is a coordination mechanism to ensure that the civil side and the criminal side and the agency, the Department of Defense, all are working together, that the right hand and the left hand know what each other is doing.

Mr. GLICKMAN. Do you know how many indictments this unit has obtained against major defense contractors?

Mr. WILLARD. I don't know, Mr. Chairman, although, again, I suspect that a lot of their work would not result in indictments by the unit, because they may refer a matter to lawyers who would be handling it who are not technically part of the unit, so as a clearing house, they would not always go out and handle the cases.

Mr. GLICKMAN. Well, OK, let's ask the question the other way. How many indictments or convictions have been obtained as a result of cases that have been run through this defense task force that may have been handled by them or by somebody else in the Department? Do you have any idea on that?

Mr. WILLARD. We will try to find that information. Again, that would be a criminal rather than a civil matter, but we will try to find it out.

Mr. GLICKMAN. Do you think the unit is fulfilling its goal of deterring fraud in dealing with nationally significant cases?

Mr. WILLARD. Well, Mr. Chairman, I think the unit is part of our overall effort, and I think it would be misleading to try to exaggerate the role of the unit. It is really a mechanism that has been developed to assist everything else that we are doing. Both the Civil Division and the Criminal Division, the U.S. attorney's offices and all of our client agencies, including their inspectors general and investigators are part of this overall effort. The unit is really just one part of the much broader effort.

Mr. GLICKMAN. Well, OK. Let me just read you quickly a colloquy between the Attorney General and Senator Grassley back in March 1985 during the Department of Justice authorization. In describing the unit, Mr. Meese said, "The unit was set up not to handle ordinary contract fraud which is now being handled by U.S. attorneys, but to handle the more complex and more difficult cases, as well as to assist and train U.S. attorneys so they would be better able to handle these cases," and then Senator Grassley responds, and I will paraphrase it, because the record can refer specifically.

"I would like to suggest the record does not support the assertion that we are going after the big contractors and that we are going after those cases that were not unadvisedly prosecuted. Just take a

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look at the fact that only one case the unit has done has involved a major contractor. That was the *Sperry* case."

Now, I don't know what has happened since then. I wonder if you would respond both as to Attorney General Meese's characterization of the unit as well as to Senator Grassley's response to him?

Mr. WILLARD. Well, as I said before, I think it is a little bit misleading to focus only on the unit in isolation from everything else that is being done. There are plenty of major defense contractors who have been subject to investigation, prosecution and civil action by the Justice Department, inciuding GE and the Philadelphia case.

Mr. GLICKMAN. Is that case handled through this unit?

Mr. WILLARD. I don't know, Mr. Chairman.

Mr. GLICKMAN. Can you find out for us?

Mr. WILLARD. We can find out.

Mr. GLICKMAN. Thank you.

[The information follows:]

Case was handled by U.S. attorneys' office in Philadelphia.

Mr. WILLARD. It is a little hard to separate out of my own mind what the unit itself does as opposed to what other parts of the team do. I think that is perhaps part of the problem in the colloquy—and I wasn't there and I can't be sure of what was on everybody's mind—if you focus on the unit in isolation of everything else that is going on, it is difficult to say that this unit in and of itself is doing all of these great things, because it really is doing a part of an overall effort.

Mr. GLICKMAN. All right. We are going to come back around again.

Mr. Frank.

Mr. FRANK. I am glad to have your testimony in one particular aspect. As I understand it, the case you were referring to involving Mr. Gravitt is still under litigation; is that correct?

Mr. WILLARD. That is correct, Mr. Frank.

Mr. FRANK. And I want to congratulate you for talking about it because that is one of the great dodges of people who want to avoid embarrassing questions is to say, I can't talk about it, it is under litigation, and to have one of the premier lawyers in the Federal Government, the head of the Civil Division make clear that that is nonsense, I welcome. It is perfectly clear that there are specific instances in which discussing a pending case there might be a problem. I understand that.

But it is invoked generally time after time after time and when I write to administration officials about a case that might be pending in a circuit court before some appellate courts who are highly trained to insulating themselves from every other influence, and I am told, we can't discuss because it is under litigation, briefs having already been filed, oral arguments having already been made, and we are simply waiting for a decision, is nonsense, and I congratulate you for your implicit puncturing of that, and I want to assure you I will cite you as an example in future cases because I think that you are a good lawyer and you understand that there are some things you can say that will in no way, shape or form cause any problems.

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Mr. WILLARD. Could I respond to that, Mr. Frank?

Mr. FRANK. Sure.

Mr. WILLARD. Of course this is a civil case, not a criminal case.

Mr. FRANK. I understand that. I am talking about civil cases, and I understand your fight with Senator Grassley, your Department, and I understand that there may be specific cases in a criminal case that is a different situation. But I am talking civil cases. I am talking about the State Department's decision to ban Hortencia Allende several years ago, she couldn't come back in the country, it is pending in circuit court, and George Shultz still acts as if he tells us why they kept her out he will be found in contempt of court, and it's nonsense. No, I understand the civil, criminal distinction.

Mr. WILLARD. In addition I would say, Mr. Frank, that this committee has had a good relationship with the Civil Division over the 4 years that I have been there, and I think we have had good communications with the staff and we hope that will continue.

Mr. FRANK. I appreciate that, Mr. Willard, but I know you are suggesting, and I want to make it explicit that one only discusses subject with congressional subcommittees with which one has good relation. That is not a prerequisite in our Constitution for executive legislative discussion.

Mr. WILLARD. Let me say I think——

Mr. FRANK. No, the fact is there is no good reason most of the time in civil cases why intelligent people can't discuss something that is under litigation, and I understand, I didn't tell you why I wanted to congratulate you, but you have done it and there is no need to try to take it back. You are right. A lot of people just hide behind it.

Mr. WILLARD. No, I am not trying to take it back, Mr. Frank, but as you recognize, there are sometimes good reasons why, even in civil cases, pending litigation can't be discussed.

Mr. FRANK. I understand that.

Mr. WILLARD. And this committee has been sensitive to those issues in the past.

Mr. FRANK. Oh, no, no, no. What you tell us, that is not controlled by our response. What you say, what you have pointed out is that there are perfectly good times when the litigant on behalf of the Federal Government, as you are in the Civil Division, can discuss the subject matter, and whether or not we misuse it. How can we misuse what you say, you say in terms of the court?

I just have one other question. With regard to Mr. Gravitt, I was a little concerned. Are you suggesting—you said that the provision of the statute that you have invoked to threaten to cut him out of any settlement altogether was in fact put in to deal in with people who are not at all in his category.

You said it was put in there to prevent parasitic lawsuits by people who were not involved in bringing the claim forward, and you agreed he was not in that category. That sounds to me like a misuse, at least, of the intent of the statutory provision.

Mr. WILLARD. Mr. Frank, the statutory provision says what it says, and the fact that——

Mr. FRANK. And you are telling us the reason for it was other than this case?

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Mr. WILLARD. That is my understanding of the legislative history of I believe it was the 1943 amendment of the act.

Mr. FRANK. So you are saying that you are going with the words and not the intent?

Mr. WILLARD. That is correct.

Mr. FRANK. OK. Good. I hope you will talk to the Attorney General about that, that you can sometimes just use the words and not just the intent of the framers are not going to be controlling on the Justice Department in this case. The Attorney General has gotten into this intent of the framers business, so again, I thank you.

Mr. WILLARD. Could I clarify my answer? I didn't say that it was irrelevant. I said where the statute clearly contains language that says one thing, we can't ignore that language because it may lead to a result different from what the drafter intended when they wrote into the statute.

Mr. FRANK. But as you say, in this case you are using that for a purpose which is quite different than the intent of the framers of that particular statute?

Mr. WILLARD. But it is not necessarily contrary to their intent.

Mr. FRANK. Well, it is different. Well, it sounds to me contrary. I am not going to get into the semantics. The intent was to exclude parasites, but you said he is not a parasite as you have defined it, but you are going to use that to exclude him anyway because that is what you said, and the intent of the framers isn't going to avail him anything. I think that is a perfectly legal position. You and I are on the same side. It is Meese that you can go back and fight the rest of this with him.

Mr. WILLARD. As long as it is clear I don't necessarily agree with what you said, Mr. Frank, I am happy.

Mr. FRANK. No, I think it is clear. What you have said is that the intent of the people who wrote that statute was one thing and you are using it for a quite different purpose. It was to exclude people who parasitic and didn't have an involvement in the claim and here is a case of a guy who brought the claim and you are going to use it against him because that is what it says.

Mr. WILLARD. Well, on the issue of the original intent, I think the Attorney General has made clear that the text of the Constitution is the primary vehicle for determining what the Constitution means, and so that this debate over original intent of the framers is one that occurs as a secondary issue to the text of the Constitution.

Mr. FRANK. Right, except the text is something that is written in 1787 as pressured as the writers may have been it is going to leave a lot of ambiguities in a lot of important cases, as I think is true in this case.

Let me go on and ask you about your division's role in Gramm-Rudman. Were you involved in that?

Mr. WILLARD. Yes, I was.

Mr. FRANK. It says here on page 2 of your statement, "Much of the increased litigation defended by the Civil Division involves increased challenges to acts of Congress. The Federal Programs Branch of the Civil Division defends against these attempts to diffuse your power," except that in this case, you attacked; is that correct?

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Mr. WILLARD. Yes.

Mr. FRANK. I was struck by the President having signed the bill asserting its unconstitutionality and immediately thereafter directing you to sue it to knock it out. It seems to me that if I were presented with something I thought was unconstitutional in my responsibility having taken an oath to uphold the Constitution, I would try and stop it from happening. I wouldn't help it to become law and then bring a lawsuit.

I mean it seems to me the President seems to be a little bit in the position of the fire chief who having started a fire ordered his brigade out. I mean, he said, this is an unconstitutional act and as soon as I sign it giving it force of law, I am going to send my guys in to sue the hell out of it.

Did you advise—at what point did your Department decide that it was unconstitutional?

Mr. WILLARD. First of all, Mr. Frank, we didn't bring the lawsuit. The lawsuit was filed by Congressman Synar and a group of your colleagues.

Mr. FRANK. I am aware of that.

Mr. WILLARD. We were named as a defendant and we were brought it.

Mr. FRANK. Correct.

Mr. WILLARD. And so it wasn't as though we decided to go out and file a lawsuit to challenge the bill. We were brought in as a party and then had to take a position. The President observed in his signing statement that he believed that the provision referred to had constitutional problems, but was willing to sign it because of the backup mechanism included in the act.

This is a very unusual situation. Congress passed the law and because it was so clear there were constitutional problems with the role of the Comptroller General, included a special provision about what would happen if it were struck down as unconstitutional.

Mr. FRANK. I understand that. I think the majority of my colleagues voted for that law over my objections were just as irresponsible with regard to the Constitution as well as the President. I think people who take an oath to uphold the Constitution and then load it onto the courts, I think that is a class example of the abuse of the courts, to hide behind the people with life tenure, do something that looks politically attractive, understanding full well that it has got constitutional problems, and this particular case, it will say this for Congress. At least the Congress had the majority, with which I disagree, the courage of its convictions because the lawyers for the Congress were sent in there to defend the law.

The President signed the law and then instructed his attorneys to sue and declare it unconstitutional, and I think that is a very bizarre way for anybody to uphold an oath. If you think something—and that is why I ask you, at what point was it the opinion of your division that this was unconstitutional?

Mr. WILLARD. Well, first of all, Mr. Frank, my division litigates. We don't give opinions. That is another part of the Justice Department.

Mr. FRANK. At what point were you instructed by the Justice Department that this was considered to be unconstitutional?

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Mr. WILLARD. I don't know exactly how that occurred and who did what. I do know that the President's signing statement contained a reference to his concern about the unconstitutionality of this provision and his determination in signing the bill understanding that.

Mr. FRANK. And my recollection of that is he thought he might be unconstitutional, but he thought it was?

Mr. WILLARD. Yes, and he decided to sign the bill notwithstanding that because of the clearly constitutional backup mechanism that was included in the bill.

Mr. FRANK. Yes, although now I think we have a very difficult situation where the Government is being subjected to a bad case anyway. The President thinks it is unconstitutional and he signs it anyway and then a three-judge court says it is unconstitutional but they got to go into effect anyway and now we got all these problems.

How much have you been cut? Are you going to take a cut on the March 1 sequestration?

Mr. WILLARD. Yes.

Mr. FRANK. How much?

Mr. WILLARD. I believe it is 3.4 percent or something like that.

Mr. FRANK. I guess it is 4.3.

Mr. WILLARD. Whatever it is—4.3.

Mr. FRANK. That is going to go across the board, so this understaffed department of yours which is coming forth to ask us for more people, I agree with you. I think the Government, at any level, which allows litigation delays is falling short of its responsibility on both sides and so I agree with you and I am going to vote for more money for you, but then I didn't vote for Gramm-Rudman, so I am probably one of the few people that do that consistently.

But this understaffed department of yours which is not able to do everything you ought to do and that is why you have to ask for more money is going to receive a 4.3-percent cut under this bill as of March 1; correct?

Mr. WILLARD. That is my understanding, and I think it amounts to approximately $3 million.

Mr. FRANK. And if the second sequestration were to go into effect, if the Supreme Court says to Congress and the President, no, we think that when you voted for this and signed it, it was constitutional, you will get the full cut again if we have to get into sequestration?

Mr. WILLARD. It is my understanding the way it works it would apply across the board and it would include the Civil Division.

Mr. FRANK. And what is the effect of the March 1 cut going to be on your capacity?

Mr. WILLARD. The effect has been primarily that we have had a hiring freeze in place and so we will be below our scheduled strength at the end of the fiscal year due to attrition.

Mr. FRANK. How will that affect your capacity to do your job?

Mr. WILLARD. That will certainly impair our ability to handle the cases as well as we would have been able to handle them.

Mr. FRANK. So the problems you have referred to here will be, if you have to take a 25-percent cut as of October 1, or a 20-percent cut, what kind of shape will you be in after that?

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Mr. WILLARD. Well, it would depend on whether or not Congress passes an appropriations bill for the Justice Department including the request that we have made. Then obviously, a cut of 25 percent from this increased level would not be as debilitating as a cut from our current level.

Mr. FRANK. In other words, if we buy you a wig it won't be so bad when you get a haircut. I understand that. $5.7 million is what percent of your budget?

Mr. WILLARD. I believe that our base budget is $74 million.

Mr. FRANK. So 5.7 percent is about 6 or 7 percent, something like that?

Mr. WILLARD. Something like that.

Mr. FRANK. So if you get the increase you are asking for, you then go from 74 to, say 80, then you would be cut back to, let's say, a one-fifth cut and one-fifth of 80 is 16; you would be cut back to 64. What kind of shape will you be in if we give you the appropriations exactly as you ask for, and then sequestration goes into effect? I mean I am told that someone has been sequestered, I don't think that means that he has disappeared from the face of the earth never to be seen again.

As I understand under Gramm-Rudman, an appropriation that is "sequestered" in fact disappears and doesn't go, so I think we got capital punishment, but if Gramm-Rudman goes into effect, we vote your appropriation in and then Gramm-Rudman goes into effect, you will have $64 million, $8 million less for next year than for several years?

Mr. WILLARD. Those kinds of cuts, Mr. Frank, would have a very severe and debilitating impact on the Civil Division's ability to represent the government in litigation.

Mr. FRANK. It might even cost us some money?

Mr. WILLARD. It could very easily end up costing us more money.

Mr. FRANK. I agree with what you say and I think you are very much on top of this job, that this aspect of Gramm-Rudman, for which people voted, which is what it says in the law if it goes into effect, will in fact cost the government more money than it will save.

Mr. WILLARD. Well, Mr. Frank——

Mr. FRANK. The interesting thing——

Mr. WILLARD. I'm sorry.

Mr. FRANK. Go ahead.

Mr. WILLARD. The President has indicated though that those cuts will not be necessary if Congress will adopt his budget submission for fiscal year 1987. So our position is that Congress should adopt the President's budget so that these debilitating Gramm-Rudman cuts will not be necessary.

Mr. FRANK. I understand that and if that prevails in the Republican Senate, you will be in good shape, and if you would like to, well, if it were legal I would like to offer to make a bet with you, Mr. Willard, but in respect for your position I would not want to compromise you that way, but you and I know there is very little chance of that happening and I understand that.

If we give the President a $35 billion increase in the military and adopt his HUD budget so the only federally funded urban program left is Amelda Marcos' real estate purchases in New York, then

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you will be all set. but if that doesn't happen, and I don't think it is going to happen, then I just want to know what the effect of the Gramm-Rudman sequestration will be. You tell me it will have a negative effect on your department. That is an honest answer, and I think if it goes into effect, it will wind up costing more money than it is going to save.

No further questions.

Mr. GLICKMAN. Thank you.

Just before I get to Mr. Coble I would like to ask you one question. Will you be participating in the brief writing process before the Supreme Court in the oral process as well?

Mr. WILLARD. Certainly I will be participating in the brief writing process, Mr. Chairman. I don't think the Solicitor General has yet decided about the oral argument.

Mr. GLICKMAN. I realize that nobody can prognosticate what the Supreme Court is going to do but what is the general thinking in the Justice Department in the Civil Division now about this case on appeal?

Mr. WILLARD. Well, because the case is pending in litigation, it might not be appropriate for me to publicly comment on what I think the court is going to do. So I would hope the committee would permit me not to answer the question.

Mr. GLICKMAN. I assume that you would like to see the court's decision, three-judge panel's decision, sustained?

Mr. WILLARD. I think it is proper for me to say yes to that.

Mr. GLICKMAN. OK.

Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Chairman, I wanted to make a comment concerning the proposed increased request Mr. Willard makes. Requests such as this, Mr. Chairman, have a way of taking on political tones. I am confident if we had a Democratic administration that virtually every Democrat on the Committee on the Judiciary would knock the door down to pass it. By the same token virtually every Republican may well do the same thing. Even Mr. Frank says he is going to vote for it. I probably will oppose it.

And, Mr. Willard, I dislike absolute statements, but I am about to make one, and I want to repeat what Congressman Frank said. You are a good witness. You have appeared before us previously. You have always acquitted yourself very ably, but you and I are about to disagree, and here is my absolute statement.

I have never seen an attorney, Republic, Democrat, Independent, Mugwump, whatever, who is on the Federal payroll who is overworked. Now, there may be one, and I have had many dealings with them, but the impetus is not there. The impatient client is not there. You know, you got to get it done tomorrow. And for that reason it is my belief that we can get along with what we have.

Now I know you are not in agreement with that. You all are requesting an additional $5.75 million and 72 new positions in fiscal year 1987.

Mr. Chairman, as a result of Gramm-Rudman, which I cosponsored, I have been forced to reduce my congressional staff by 11 percent and no staff member who remains will even be considered for a pay increase this year.

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Now, Mr. Chairman, I thank you for letting me say this, and I think what I am saying is pertinent.

I would like to ask you, Mr. Willard, if you were a Member of Congress and you voted in favor of the additional $5.75 million for the Civil Division, along with the 72 new positions, while at the same time you were handing out walking papers to your staff, you would be hard put, I believe, to explain to your constituents how on the one hand you vote to increase the Justice Department by *x* number of dollars, over $5 million to be specific, while at the same time reducing their, that is the constituent staff, by 11 percent. I might add that I am not comfortable, Mr. Willard, opposing my administration. I am very proud of this administration, but sometimes I get put out with them because I think the administration often times is either unable or unwilling to bite that bullet.

And, Mr. Chairman, if you will arm with me a bush ax, I can walk around these halls. Of course, the majority side on the House is not without blame either, and I could cut some weeds out, Mr. Chairman, and I will volunteer to do it if you have the power to do that.

My point is, folks, the deficit ain't going to disappear and I think we are going to have to say no to you, Mr. Willard, to Coble, to Frank, to the whole crew. We are all going to have to suffer, not unlike——

Mr. GLICKMAN. Would the gentleman yield?

Mr. COBLE. Yes.

Mr. GLICKMAN. The gentleman did not mention my name and Mr. Frank's because he knows we are a contributor to——

Mr. COBLE. Mr. Chairman, I am sorry. That was inadvertent.

Mr. FRANK. If the gentleman would yield, I would point out under the Gramm-Rudman bill which we passed, it is our staffs that get the pay cuts. We don't lose a penny, any of us.

Mr. COBLE. Oh, I am aware of that, but we are all going to have to suffer. Well, for your information, Mr. Frank, I am refusing to accept the congressional pension. I am not participating in that.

Mr. FRANK. If the gentleman would yield, neither am I.

Mr. COBLE. I will yield in just a minute. Let me finish this. So assuming I stay up here long enough, I will, not unlike the new shoe, I will suffer a little bit of pinch and we are all going to have to suffer some pinch and Mr. Willard, not personally against you, but I am going to oppose this.

Thank you, Mr. Chairman.

Mr. FRANK. If the gentleman would yield, I would just like——

Mr. COBLE. I would be happy to yield.

Mr. FRANK. I am also not in the pension system and I would have had more years to put into it.

Mr. COBLE. Would the gentleman yield?

Mr. FRANK. I am not participating in the Federal pension system at all.

Mr. COBLE. I am glad to hear that. I commend you for that.

Mr. FRANK. Thank you.

Mr. COBLE. I would like to have you on my bill that repeals the congressional pension.

Mr. FRANK. I will take a look at it.

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Mr. COBLE. You were conspicuously absent and I would like to have you on that, Mr. Frank.

Mr. FRANK. I don't remember getting it. I will be glad to do that. And when we are both 80 years old, we will practice law together.

Mr. GLICKMAN. Because you won't have any money any other way if you stay in this place.

Mr. WILLARD. Mr. Chairman, could I just respond briefly.

Mr. GLICKMAN. Sure.

Mr. WILLARD. I appreciate Mr. Coble's courtesy and I have always enjoyed appearing before the committee.

Mr. COBLE. And I was sincere about that.

Mr. WILLARD. And I don't think I am going to change your mind, but I would just like to make a couple of observations.

First, the Government is a big place and not all Federal agencies are the same. And that is one of the problems with across-the-board cuts, they cut evenly, and they cut the good with the bad. That is why the President is proposing a budget that tries to make differentiation rather than cutting everything evenly. He thinks that that is better than across-the-board cut under the Gramm-Rudman mechanism.

Second we have had to satisfy a lot of very tough green eyeshades people with our budget request, both at the Department and at OMB. And I think that most people in Government know that OMB is not usually a sucker for people who want extra money. They have really put us through a wringer in terms of justifying the increases we want.

I do firmly believe, though, that this is a situation where a failure to provide some modest increases to keep up with case load growth would end up costing the Government more money than it would save.

Most of the cases we handle—about 90 percent—are defenses, cases where people are suing the Government and asking for money or other kinds of relief that will cost the taxpayer money. If we don't have enough lawyers to handle those cases, and judgments are going to be entered against the Government that have to be paid out of the Treasury.

The rest of our cases are affirmative cases where we are trying to collect on debts owed the United States, often by big corporations. And, again, if we don't have enough lawyers when we go into court to fight with other creditors, including the big banks and other people like that who can have the finest law firms in the country, we are not going to get the fair share of that money for the taxpayer.

Now this is very hard to quantify and since lawyering is an imprecise science, and I can't say if we don't get this money the taxpayer is going to lose $10 or $20 million or $200 million. I just can't say that.

But, my firm belief is that our budget request is a cost-effective increase to the taxpayers. And I can assure you that in the Civil Division we make every effort to see that the money is wisely spent and that our lawyers do work hard.

Moreover, our attorneys aren't paid very well, compared to what they could get in the private sector. Our starting salary for new lawyers is $26,000 a year. Most of the firms here in Washington

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pay $45,000 or more, and in New York, they pay over $50,000 a year. So our lawyers start out making only about half as much as a lot of their colleagues in the private sector. They work hard, not that every single one of them works as hard as he could, but on balance they do work hard. And our timekeeping records document that our lawyers work a considerable amount of overtime for which they are not paid.

So I don't know if I can change your mind, Mr. Coble, but I do think that this is an area where the taxpayers really are getting a considerable benefit for their money and certainly it is going to be my effort to make sure they continue to get that.

Mr. COBLE. Thank you. And Mr. Chairman, again, I apologize to you and my colleague. I did not intend to overlook you two.

Mr. GLICKMAN. We kind of enjoyed being overlooked.

Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman. I, for the first time, have begun to feel somewhat guilty about being a participant in the congressional pension system, I have to say. Nonetheless, let me pose a few questions to the witness.

I wonder if there isn't another way to help you solve your problems about the need to improve debt collection services without actually increasing your budget to do it. I know that under current law, you are able to contract out for certain debt collection services. You have acquired debt collection firm services which can prepare the debt collection case up to the point that the suit has to be filed.

At that point in time, I understand the Department of Justice has to file the suit. But under current law you are not able to acquire the services of private attorneys. You can't contract out to a law firm to actually file that suit.

I wonder how the Department of Justice would feel about the passage of legislation that would give you the authority to obtain the services of private counsel to pursue the debt collection process all the way and including the filing and handling of the case?

Mr. WILLARD. The administration has supported such legislation and in fact submitted a bill this year that would include the authority for the Attorney General to retain private counsel in debt collection cases. Under his supervision. So that is a measure the administration supports.

I would like to point out, though, that the vast majority of debt collection cases do involve fairly small amounts of money and are handled by U.S. attorney's offices and not by the Civil Division. They are the ones who are really on the front lines collecting on student loans, and other debt matter.

Now, the kind of cases Civil Division lawyers handle tend to be very large cases involving multimillion dollar debts such as Small Business Administration loans, and REA, utility bankruptcies. We have a couple of REA loan default cases which together total over a billion dollars.

We have Maritime Administration ship mortgage repossessions involving millions, tens of millions of dollars. So, debt collection covers a broad spectrum and the kind of work our Civil Division lawyers do are the giant cases which we would not contemplate contracting out to private counsel.

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Mr. BOUCHER. You do support, however, the passage of legislation which would permit the contracting out of cases generally either through the U.S. attorney's offices, or through the Civil Division, as you deem appropriate?

Mr. WILLARD. That is correct, Mr. Boucher. The administration supports that bill.

Mr. BOUCHER. That is a change from previous years, I believe.

Mr. WILLARD. I believe the administration has supported that bill for the last 2 or 3 years anyway.

Mr. BOUCHER. That differs from my recollection, but I am pleased to hear that that is the current position of the administration.

Let me follow up on a question that Mr. Frank initiated regarding your statement on page 2 of your prepared statement that you are defending challenges in the courts to acts of Congress, and for that reason, need additional resources.

I can remember a couple of instances where your Division has taken exactly the opposite side and has not defended challenges to acts of Congress, but in fact, has participated in the challenge. That was the case with regard to Gramm-Rudman, as Mr. Frank pointed out. It was also the case with regard to the Burford contempt citation, and it was the case with regard to the Competition and Contracting Act in 1984 and 1985.

How does your division perceive your role? Are you the attorneys for the U.S. Government, or are you the attorneys just for the executive branch?

Mr. WILLARD. By and large, in the vast majority of the cases we regard ourselves as attorneys for the United States and the U.S. Government generally, and in the vast majority of cases we strongly defend the constitutionality of acts of Congress. We must have hundreds and maybe thousands of cases we are currently handling where the constitutionality of an act of Congress is drawn in question and we are defending that.

In a few very unusual cases we cannot do that because there is a conflict between Congress and the executive about the constitutionality of the statute then we represent the interest of the executive branch. However, we do so pursuant to statutory requirement that we notify the Speaker and the President of the Senate in those instances, and in many of those cases very able counsel for the House and the Senate intervene and appear to defend the constitutionality of those statutes, as has occurred in the *Gramm-Rudman* case, and the Competition in Contracting Act litigation.

But that is really a very small minority of the cases that come up that involve constitutional challenges. In the vast majority of them our interest and the interest of the Congress are perfectly consistent. We try to do our best job to defend those statutes.

Mr. BOUCHER. You are saying that in the broad sweep of cases you regard yourselves as counsel for the United States and will defend the acts of Congress that are challenged in the courts, but in some cases that is not the way you perceive yourselves. You perceive yourselves as exclusively the attorneys for the executive, and I believe you said you decide who you represent based upon whether or not the executive differs with the Congress over the constitu-

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tionality of the act in question. Am I correct in phrasing your answer?

Mr. WILLARD. It is actually a little more complex than that. First of all, this is a decision, that is made by the Attorney General. We don't make it down at the Civil Division. It is a very important decision, and when it occurs it is made reluctantly, and as I understand it, these decisions fall really in two categories. One, where an act infringes on the executive's constitutional powers, the Department will not defend the constitutionality of the statute. Another case, which is exceedingly rare but occasionally occurs, is where even though an act does not infringe on the executive's constitutional powers, it is so clearly unconstitutional in our view that we could not in good conscious defend it in court.

In many cases, though, we defend statutes which are not necessarily statutes that are supported by the administration for policy reasons.

Mr. BOUCHER. In at least two of the instances that I have cited where you went into court against the position of Congress, you were also going into court against the administration which had signed the two acts in question, that being Gramm-Rudman, and the Competition and Contracting Act. I find it somewhat difficult to understand the test that you employ to determine whether you represent the entire U.S. Government or whether, indeed, you are representing just the executive, because in those cases, I think it is arguable that you were representing no one but the Department of Justice.

Mr. WILLARD. Well, certainly in the *Gramm-Rudman* case and the *Competition in Contracting Act* case, the President made note of the constitutional problems in his signing statement but concluded because the unconstitutional provision of those acts were fairly minor in the overall scheme and were severable—and thus the acts could operate in a constitutional manner—notwithstanding those provisions that he went ahead and signed him. That, of course, was his decision to make, and so, it is not as though you have the Justice Department disobeying orders from the President. In both of those situations the President was aware of the constitutional problems and made note of them at the time he signed the legislation.

Mr. BOUCHER. I think one additional problem is created by the imprecision with which neutral parties, people outside the Department of Justice, can perceive your role and predict in advance what you are going to do is the fact that in those instances where you have chosen to challenge or participate in the challenge to acts of the Congress, you have also challenged the standing of Members of the Congress to defend those acts on their own.

The Gramm-Rudman situation, I think, is one where you were challenging the standing of a Member of Congress to come forward. I believe, if I am not incorrect in suggesting that that was the case in the Competition and Contracting Act.

When you were challenging the counsel for the Congress to defend that act, and you are challenging the act yourself, who is supposed to defend it?

Mr. WILLARD. Well, in the *Gramm-Rudman* case we were challenging the standing of the Congressmen who were attacking the constitutionality of the statute. We did not object to counsel of the

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House and Senate intervening to defend the constitutionality of the statute.

Mr. BOUCHER. How about the Competition in Contracting Act?

Mr. WILLARD. I am not aware, that we were raising a standing challenge there, but it has been awhile since I have looked at those cases.

Mr. BOUCHER. It is my understanding that the Department of Justice did in fact claim the right to challenging the House to defend the constitutionality of that statute at a time when you were challenging its constitutionality. If you were not going to serve as counsel for the entire Government and you were going to challenge the right of the counsel for the House to intervene, who is supposed to defend the constitutionality of those acts?

Mr. WILLARD. I simply don't remember that, Mr. Boucher. It is certainly possible that it happened. Generally, the Supreme Court has recognized, as in the legislative veto case and other cases, that Congress can be a proper party to appear and defend the constitutionality of statutes. As far as I know that has happened in all the cases where the Justice Department has not done so.

Mr. BOUCHER. Let me ask you just a couple of questions on a slightly different subject. Are there some debts which the Government does not elect to pursue as a matter of policy or which you pursue with lesser intensity as a matter of policy, such perhaps as Small Business Administration debts or farm loans?

Mr. WILLARD. Generally speaking we pursue all debts vigorously, but we analyze them on a case-by-case basis, in light of typical litigation risk factors, such as the strength of our case, the difficulty and the expense of litigation and likely recovery. We don't have any policy—at least that I am aware of in the Civil Division—any absolute dollar limits saying that debts below a certain size we won't pursue a case at all. But we do have to take into account our limited resources and balance that against the nature of the claim that we are pursuing.

Mr. BOUCHER. So you are not treating farm loans or Small Business loans any differently today than you treat other kinds of debts?

Mr. WILLARD. We may treat some cases differently than we would other cases because of the circumstances of the case. But I am not aware of any policy that we have that those loans should be treated differently, aside from the litigation factors that would go into influencing how you handle a case in any event.

Mr. BOUCHER. In a general way, can you give us some idea of what kinds of cases you are seeing increases in today that would justify an increase in your debt collection budget?

Mr. WILLARD. Well, some of the debt collection cases I mentioned are typical of the Civil Division's most important cases.

For instance, we have REA loan defaults, several rural electric companies have defaulted or threatened to default on very large loans, involving hundreds of millions of dollars. We have been in litigation with major banks who are also creditors, in attempting to protect the Government's interest in those cases. Those cases involve, obviously, very large sums of money.

The division has also handled litigation involving the Synfuels plant in North Dakota in an effort to enforce the Government's

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contractual right vis-a-vis the companies that had contracted to buy the gas from that plant.

In the WPPSS litigation, the Washington Public Power Supply System, bond default, we have represented, the Government agency, the Bonneville Power Administration, in litigation concerning several billion dollars of defaulted loans that were issued to fund nuclear powerplant construction.

Mr. BOUCHER. These sound more like isolated cases, however, that might be a part of the normal flow of litigation. Are you seeing a substantial increase in a particular area of cases that would justify a major increase in your budget, or are you just saying the total number of cases that you handle that are in the general run of cases has increased enough to justify that increase?

Mr. WILLARD. We have seen a real increase in the number of big dollar cases that have come in in this commercial area, including the ones I have mentioned. Each of those cases alone can require the services of a team of lawyers full time to adequately protect the Government's interest.

And for whatever reasons, we are seeing a lot more of these cases than we did a few years ago.

Mr. BOUCHER. So you are saying it is just big dollar cases that are causing this need for increased personnel. It is not the volume of litigation per se in terms of total numbers of cases?

Mr. WILLARD. It is that too. The total number of cases handled by our commercial litigation branch has gone up across the board in the U.S. Claims Court involving disputes with Government contractors, cases in the Court of International Trade involving customs litigation, personnel cases. Almost every category of our case load has shown increases. One of the reasons that we are particularly concerned is due to the need to insure that the Government's interests are adequately protected in cases that can literally involve tens or hundreds of millions of dollars of taxpayer money.

But totally apart from that, we have had a continued upsurge of litigation that our lawyers have to handle.

Mr. BOUCHER. I haven't had a chance to review your statement thoroughly. Do you have in that statement an indication of the volume of cases that you are experiencing this year as opposed to last year, and do you have some sort of trend for us so that we can see what the volume looks like?

Mr. WILLARD. The statistics are in the statement and the chart that I have here shows basically the same thing the red line being the dollar volume of claims, the blue line the number of cases, and the green line at the bottom the size of our staff from 1981 to present. The figures are then projected over the next 2 years, and which obviously, the projections are somewhat imprecise, the trend line has been sharply upward both in terms of the number of cases and the amount of money at issue

And, as I think my statement indicates, from 1981 to 1985 our case load went up 140 percent. During that period, the size of our staff went up 26 percent. So our lawyers have been handling a much heavier volume of litigation per lawyer than they did even 5 years ago.

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Mr. BOUCHER. Now, are these statistics based purely on the Civil Division, quite apart from the U.S. attorney's offices and their efforts in civil debt collection?

Mr. WILLARD. That's right. These statistics include cases either that are entirely handled by the Civil Division or ones that are handled on a joint or supervised basis between the Civil Division in the U.S. attorney's office. It does not include any of the cases that are handled exclusively by U.S. attorney's officer, such as the small debt collection cases.

Mr. BOUCHER. Thank you very much. Thank you, Mr. Chairman.

Mr. GLICKMAN. Thank you, Mr. Boucher.

I have just one other line of questioning I want to get into quickly. But before I do that, we are going to submit to questions to you that we would like for you to, if possible, submit in writing.

One has to do with the issue of constitutional torts. One has to do with administrative handling of tort claims, and then I want to get specific answers of qui tam cases on data on those qui tam cases, how many were tried, how many were settled, and we will supply that to you in writing.

Mr. WILLARD. We would be happy to answer those questions, Mr. Chairman.

Mr. GLICKMAN. One question on the qui tam issue in the *Gravitt's* case. Generally, is it a fair statement to say that you don't like these cases, the Justice Department treats these cases in kind of a disparaging manner, or do you treat them in the same way as you do other fraud type cases?

Mr. WILLARD. We look at the allegations in these cases carefully, especially if there is an indication the Government may have been defrauded. However, it has been our experience that most of the qui tam cases that we see are not meritorious, and rarely do they lead to a recovery on behalf of the Government.

The only area where the qui tam statute has, in our experience, worked well is the area of Medicare-Medicaid fraud, where State governments sue because both they and the Federal Government have been victimized by those kinds of frauds. In these cases, we work cooperatively with them in the use of the statute.

But by and large we have found that the qui tam statute consumes a lot of resources disproportionate to the amount of recovery that is available to the Government.

Mr. GLICKMAN. Resources of the Justice Department?

Mr. WILLARD. Of the Justice Department in deciding whether or not to participate in the litigation. I think the *Gravitt* case is a good example.

This was not a case where someone was acting in bad motives which is frequently the case. Here is a qui tam plaintiff who is acting with very commendable motives, and very sincere in his allegations, but it turned out that the case was not what it might have appeared to be at first in terms of loss to the Government.

Mr. GLICKMAN. But you don't know what the Government might have gained in terms of the collateral effects of that case being filed, too, right?

Mr. WILLARD. Well, that is certainly a good point, Mr. Chairman, and we have to keep that in mind that there is a deterrent effect of

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giving high visibly to our efforts in this area. That is something that we are concerned about and need to keep in mind.

Mr. GLICKMAN. OK. Well, we are going to work on false claims legislation in the next 30 or 60 days, and we will be working with you on subjects of your prior testimony, as well as the qui tam statute.

Mr. WILLARD. I appreciate that, Mr. Chairman, and we look forward to working with you and the staff on that.

Mr. GLICKMAN. One final question.

On February 19, the Assistant Attorney General John Bolton wrote to Mr. Rodino in reference to the issue of the Justice Department's position on paying private counsel to represent former or current Federal employees in litigation. You probably are aware of that because they referenced this hearing in that letter.

Mr. WILLARD. Yes, Mr. Chairman.

Mr. GLICKMAN. I would like to make that letter and relevant material for part of the record of this hearing. Now, as a part of this letter, there is great reference to Ann Burford, and I would just like to state a couple of things and ask you some questions.

[The letter of Mr. Bolton to Mr. Rodino follows:]

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Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 19, 1986

Honorable Peter W. Rodino
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This letter responds to your February 12, 1986 letter to the Attorney General regarding the Justice Department's provision of private counsel representing current or former federal employees in litigation arising out of their official duties. We will be happy to answer any further questions the Committee may have at the Civil Division's oversight hearing before the Subcommittee on Administrative Law and Governmental Relations on February 20, 1986. For your convenience, we have repeated your questions verbatim.

1. Under what statutory provision is the Department of Justice authorized to compensate private counsel for litigation activities on behalf of a current or former federal employee (hereafter "employee")?

ANSWER

The authority of the Department of Justice to retain private counsel on behalf of current or former federal employees for litigation activities in the interest of the United States derives from the statutory responsibilities of the Attorney General set forth in 28 U.S.C. §§ 516-517 and from the general authority of the Attorney General found in 28 U.S.C. § 509. A basic responsibility of the Attorney General is to represent federal agencies and their employees in connection with civil litigation. Under 28 U.S.C. § 517, the Attorney General is authorized to send officers of the Department to attend to the interests of the United States pending in suits "or to attend to any other interest of the United States." In certain circumstances, the ability of the Department to attend to the interests of the United States directly through its own attorneys may be hindered by conflicts or the appearance of a conflict. See 28 C.F.R. §§ 50.15, 50.16 (attached). See also,

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56 Comp. Gen. 615, 623, 624 (1977). In such cases, pursuant to his general authority as the head of the Department under 28 U.S.C. § 509, the Attorney General can retain private attorneys to fulfill his responsibilities.

The Department includes in its annual budget submission to Congress an amount that is specifically identified as planned expenditures for private counsel funds. These budget submissions are included as a formal part of the legislative history of the appropriations acts. Since 1982, private counsel fees have been provided as a part of the general legal activities appropriation of the Department of Justice. Appropriated funds for private counsel fees were first authorized in a supplemental appropriation in 1977, Pub. L. 95-26. Additional supplemental appropriations were enacted in 1979, 1980 and 1981.

2. How are such private attorneys selected: by the Department or by the employee?

ANSWER

Private attorneys are selected by the individual employee, not by the Department of Justice. If the employee is unfamiliar with the legal system or does not know attorneys with expertise in the defense of federal employees, the Department may provide the names of several attorneys for the employee's consideration.

3. If the attorney is selected by the employee, does the Department have the authority to review this selection? If so, on what grounds? What happens if the Department disapproves the selection?

ANSWER

Yes, the Department reserves the authority under 28 U.S.C. §§ 516-517 to review the selection of an employee's attorney. The Department reviews the selection to ensure that counsel selected meets minimum qualifications and that such representation will be consistent with ethical standards. If these requirements are met, the Department will enter into a retention agreement with counsel. In the event the requirements are not met, the Department will not fund the representation, but the employee remains free to retain his counsel of choice.

4. Must the employee obtain approval for compensation before any attorneys fees are incurred?

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ANSWER

In the vast majority of cases, approval is obtained before the incurring of any fees or expenses. Although the Department's policy guidelines generally contemplate a prior approval before any attorney fees are incurred, see 28 C.F.R. § 50.16, occasionally an employee enters into an attorney-client relationship with private counsel before requesting or receiving approval and subsequently asks for ratification of the agreement and reimbursement. A grant of that request is discretionary with the Department. Among the factors considered are whether the employee made a timely request for representation or did not do so because the employee was not informed of its availability; whether the request was delayed or denied by the Department or the employing agency for reasons of inadvertence, neglect or mistake; whether the exigencies of the litigation required that the employee protect his interests by retaining counsel before receiving approval from the Department; and whether representation of the employee either directly by the Department or indirectly by private counsel retained at the expense of the Department would have been appropriate.

5. If the Department decides to pay for private counsel, does it require that a contract with the attorney or the employee reflect this agreement?

ANSWER

If the Department decides to pay for private counsel, a statement of the conditions which apply to the retention of private counsel is forwarded to the attorney who indicates his acceptance by executing and returning a copy of the statement of conditions. The conditions are part of Civil Division Administrative Directive 2120, as amended. A copy of that directive is attached for your information. In cases where the Department agrees to provide subsequent ratification and reimbursement, the Department reviews the request to ensure that compensation will be consistent with terms and conditions of the standard agreement.

6. Does the Department require an employee or the private attorney to enter into any written agreements with the Department regarding compensation of the attorney, e.g., as to rates of compensation, reimbursable costs, types of reimbursable activities? If so, please provide a sample copy of such an agreement.

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ANSWER

See response to the preceding question, and attachment.

7. In your letter of July 10, 1985, you stated that the maximum amount of compensation for attorneys ranges from $50.00 to $75.00 per hour. On what basis did the Department decide upon this rate of compensation? Does the Department ever provide compensation at a rate different from the rates set forth in the July 10, 1985, letter? If the private attorney charges more than the rate paid by the government, does the Department allow employees to pay, on their own, the difference between these rates?

ANSWER

The rates of compensation noted in the July 10, 1985 correspondence continue in effect. They range from $50.00 per hour for a lawyer with less than three years of practicing experience to $75.00 an hour for a lawyer with more than five years practicing experience. After some experience with a few cases, the Department on July 27, 1977, adopted a policy under which the maximum fee would be $60.00 per lawyer hour. On April 12, 1982, in recognition of the increasing cost of legal services, the cap was raised to $75.00 per hour where it now stands. This amount is in keeping with the figure set by Congress in the Equal Access to Justice Act.

During the mid-1970s, prior to the standardization of fees, some attorneys were compensated at an amount in excess of the $60.00 limit, which was later imposed. We have no record of any compensation during this period in excess of $75.00 an hour. Since that time, compensation in excess of the specified rates has not been paid. Compensation of counsel by the client in excess of the rate schedule would be a matter between the client and attorney.

8. When the Department agrees to provide compensation to private attorneys, does it require each employee represented by such an attorney to waive any claims against the United States and all other parties represented by or whose representation is paid for by the United States for claims arising out of the matter in litigation? If so, please provide a copy of this waiver form or any other waiver form required to be signed by such employees. If it does not require waivers to be signed by all employees, does the Department require such waivers as to some individuals? Please list all individuals who have been

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required to sign such waivers since 1976 and a copy of each such waiver. If it has required such waivers on a case-by-case basis, how does the Department determine to do so?

ANSWER

At the outset, it should be noted that representation is only provided or paid for when it is determined to be in the interest of the United States. Representation is never provided or paid for to assert claims against the United States or other federal employees. The existence of such claims may also be considered in determining whether it is in the interest of the United States to provide or pay for representation on any aspect of a matter in litigation.

The Department does not require, as a matter of course, that an employee receiving representation or compensation for private counsel sign a waiver of claims against the United States or other federal employees. In most such cases, the interests of the United States and the employee being represented are fully consistent, and such waivers have not been necessary.

In certain circumstances, prudence would dictate that a general release be obtained, such as when an employee has indicated an intent to sue the United States or its employees on any matters relating to the representation. This, of course, is consistent with standard Department practice in settling disputes in anticipation of litigation. Prior to Mrs. Burford's matter, we are not aware the Department had ever faced the issue of an employee indicating such an intent to sue. Accordingly, the Department has no standard form waiver or release.

To the best of our knowledge, since 1976, the Department has requested and obtained a release only with regard to Mrs. Burford's request for reimbursement. A copy of the release executed by Mrs. Burford is attached.

Sincerely,

John R. Bolton

JOHN R. BOLTON
Assistant Attorney General

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Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1978.

RICHARD ALBRECHT,
General Counsel, Department of the Treasury.

Section 18. *Citations.* The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

"Section ——, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR —— (August 25, 1978)."

The short form citation is:

"Section ——, U.G.E.S.P. (1978); 43 FR —— (August 25, 1978)."

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR Part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR Part 60-3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1-18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: "Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR ——, (August 25, 1978); 29 CFR Part 1607, section 6A."

ELEANOR HOLMES NORTON,
Chair, Equal Employment Opportunity Commission.

ALAN K. CAMPBELL,
Chairman, Civil Service Commission.

RAY MARSHALL,
Secretary of Labor.

GRIFFIN B. BELL,
Attorney General.

(28 U.S.C 509, 5 U.S.C 301)

[Order No. 668-76, 41 FR 51735, Nov. 23, 1976, as amended at 43 FR 38295, Aug. 25, 1978]

§ 50.15 Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil and Congressional proceedings, and in state criminal proceedings in which Federal employees are sued or subpoenaed in their individual capacities.

(a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil and Congressional proceedings and in state criminal proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the pleadings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement con-

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taining its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation is not available in federal criminal proceedings. In other proceedings for which representation is sought, where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(5) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to that for which representation has been requested, then representation may be provided.

(6) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in the

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related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16 provided no decision has been made to seek an indictment or file an information against the employee.

(7) In any case where it is determined that Department of Justice attorneys will represent a federal employee, the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed.

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States;

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States;

(iii) Where appropriate, that neither the Department of Justice nor any agency of the United States Government is obligated to pay or to indemnify the defendant employee for any judgment for money damages which may be rendered against such employee;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraphs (a)(6), (a)(9) and (a)(10) of this section, and by § 50.16.

(8) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(9) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(10) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and potential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the posi-

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tion is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.16.

(11) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever:

(1) The representation requested is in connection with a federal criminal proceeding;

(2) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(3) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

[Order No. 970-82, 47 FR 8172, Feb. 25, 1982]

§ 50.16 Representation of Federal employees by private counsel at Federal expense.

(a) Representation by private counsel at federal expense is subject to the availability of funds and may be provided to a federal employee only in the instances described in § 50.15(a)(6), (9) and (10), and in appropriate circumstances, for the purposes set forth in § 50.15(a)(2).

(b) To ensure uniformity in retention procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel under § 50.16, the Civil Division shall be consulted before the retention is undertaken.

(c) Where private counsel is provided, the following procedures shall apply:

(1) While the Department of Justice will generally defer to the employee's choice of counsel, the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.

[Order No. 970-82, 47 FR 8174, Feb. 25, 1982]

§ 50.17 Ex parte communications in informal rulemaking proceedings.

In rulemaking proceedings subject only to the procedural requirements of 5 U.S.C. 553:

(a) A general prohibition applicable to all offices, boards, bureaus and divisions of the Department of Justice against the receipt of private, ex parte oral or written communications is undesirable, because it would deprive the

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U.S. Department of Justice

CIVIL DIVISION

ADMINISTRATIVE DIRECTIVE

2120
Amended

RETENTION AND PAYMENT OF PRIVATE COUNSEL
September 20, 1982

NOTICE

Payment of private counsel bills is covered by the Prompt Payment Act which requires payment of bills within 30 days of receipt and notification of defects in bills within 15 days of receipt. To avoid assessment of interest penalties, these procedures must be followed.

Distribution:

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U.S. Department of Justice

CIVIL DIVISION

ADMINISTRATIVE DIRECTIVE

2120
Amended

September 20, 1982

Subject: RETENTION AND PAYMENT OF PRIVATE COUNSEL

Purpose: This directive sets forth the procedure for payment of fees and expenses of private counsel retained to represent federal employees at federal expense.

Scope: The provisions of this directive apply to all branches, staffs, and offices within the Civil Division.

Definition: A private counsel is a private attorney retained by the Department of Justice to represent, at federal expense, a present or former federal employee who is sued or subpoenaed in his or her individual capacity for acts performed within the scope of his or her employment with the Government and whose representation has been determined to be in the interest of the United States. The instances in which private counsel may be provided at federal expense are described in 28 C.F.R. 50.15. References to "Department attorney assigned" are to the attorney within the Civil Division who has cognizance of the case and not to the Assistant United States Attorney who may be handling the case in a district office.

Policy: Once private representation has been authorized pursuant to 28 C.F.R. 50.15 and 50.16, it is the policy of the Department of Justice to pay a private attorney or other members of his or her firm for those legal services reasonably necessitated by the defense of a current or former federal employee in civil, congressional, or state criminal proceedings. The Department will not pay for services not directly related to the defense of issues presented by such matters.

Procedures: Where private counsel is to be provided, the procedures of 28 C.F.R. 50.16 will apply. Approval of the retention will be in the form of a written agreement signed by the Assistant Attorney General, Civil Division and the private attorney. The terms and conditions of the representation to be provided by the private attorney will be set forth in the retention agreement. These terms and conditions will also describe the legal fees and expenses which the government agrees to pay and the format and frequency of bills to be submitted for payment. Appendix A is a sample retention agreement.

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A copy of each retention agreement will be forwarded by the Department attorney assigned the case to the Executive Office. The agreement should be accompanied by an estimate of the total expected cost of legal fees and expenses under the agreement. If the case is expected to require the services of the private counsel during more than the current fiscal year, an estimate should, if possible, be provided for each fiscal year. The Executive Office will obligate funds, establish an account against which bills will be paid and will, in turn, forward a copy of each retention agreement to the Assistant Director of the Torts Branch having responsibility for representation.

In every case, a copy of the Memorandum For File signed by the Assistant Attorney General which initially authorizes the retention of private counsel will also be forwarded by the Deputy Assistant Attorney General for the Torts Branch to the Executive Office and to the Assistant Branch Director responsible for representation. The Assistant Director of the Torts Branch responsible for representation will maintain a complete file of all such authorizations.

The following procedure will be followed by the Department in the processing and payment of bills:

a. The Executive Office will draft and provide a cover sheet or memorandum to accompany each bill being routed for payment. The cover sheet will contain delineated spaces or blocks to reflect each step in the review process and the required processing time frames. By appropriate endorsement, the results of each review will be entered in the proper space by the person conducting the review.

b. Bills should be submitted on a monthly basis by private counsel to the Director, Office of Planning, Budget and Evaluation, (OPBE) Civil Division.

c. Staff of OPBE will examine each bill to assure consistency with the financial conditions of the retention agreement (billable hours, legal fees, expenses etc.) and the accuracy of mathematical calculations. OPBE will not examine for the necessity or reasonableness of any service. OPBE will certify the correctness of the bill for the items within its scope of review or will note any discrepancies that are discovered.

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d. The OPBE will forward the bills with the above certification or notation of discrepancies to the Department attorney assigned the case to determine whether the services indicated were reasonable and necessary. Note, however, that those billing items which the retained private attorney has indicated would compromise litigation tactics if disclosed to Civil Division attorneys, pursuant to paragraph 5 of the addendum to the retention agreement, will not be forwarded. Upon receipt of the bill, the attorney will certify, in the appropriate space of the cover sheet, the necessity and reasonableness of the services indicated and will forward the bill to the case reviewer for his or her certification. The bill bearing case reviewer signature will be returned to OPBE.

e. A bill which has been reviewed and determined payable through the above process will be submitted for payment through the Justice Management Division to the U. S. Treasury.

Should discrepancies be found at any step in the review process, the assigned attorney will prepare a letter for the appropriate Branch Director's signature to the billing private counsel advising him or her of the specific items which are not payable as presented and the reasons. The letter should request the submission of an revised bill. This letter must be posted within 15 days of Division receipt of the bill. A copy of the signed letter with the incoming bill will be forwarded to the OPBE.

J. PAUL McGRATH
Assistant Attorney General
Civil Division

By:

PHYLLIS A. GARDNER
Executive Officer
Civil Division

CIV 2130 (Amended)

Appendix A

SAMPLE PRIVATE COUNSEL RETENTION AGREEMENT

Robert Morgan, Esq.
Washington, D.C.

Dear Mr. Morgan:

Ms. Mary Jones has been advised by the Department of Justice that because of a conflict of interest between herself and other Department of Agriculture co-defendants in Roberts v. Jones, et al., No. 81-100 (D. D.C.), the Department of Justice cannot provide direct representation on her behalf. She has requested that you be retained to represent her interest in the litigation. Should you agree, your retention will be subject to the terms and conditions set forth in the enclosed addendum which is incorporated into and made a part of this retention agreement. You and Ms. Jones should be aware that by entering into this agreement, the Department of Justice in no way assumes responsibility on the part of the United States Government for any monetary damages that may be awarded against Ms. Jones in the litigation.

Although the Department of Justice has assumed responsibility for your remuneration in the course of representing Ms. Jones to the extent enumerated in the addendum, your responsibility is, of course, solely to your client.

As you may know, the problem of providing for private counsel for government employees sued in their individual capacities has been one of the most serious faced by the Justice Department in recent years. While we believe that it is necessary for government employees to work without the fear that they may ultimately bear the costs of litigation and attorney fees on their own, we have not been able to secure adequate funding from the Congress for these purposes. Thus, in a sense, we are asking you to undertake the representation of Ms. Jones in the spirit of the public interest as evidenced by the financial conditions of this representation which we must candidly admit are not ideal.

Should you have any questions concerning the terms of this agreement, including the enclosed addendum, please contact the Deputy Assistant Attorney General (Torts) at (202) 633-5421. If you find the provisions of the agreement

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to be acceptable, please return a signed copy of the addendum. Your retention will become effective upon our receipt of the signed addendum for services performed as of _____ _____.

Sincerely,

J. PAUL McGRATH
Assistant Attorney General
Civil Division

Enclosure

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CIV 2120 (Amended)

CONDITIONS OF PRIVATE COUNSEL RETENTION
BY THE DEPARTMENT OF JUSTICE FOR REPRESENTATION OF
CURRENT AND FORMER FEDERAL EMPLOYEES

The following items and conditions shall apply to the retention of a private attorney's legal services by the Department of Justice to represent current and former federal employees in civil, congressional, or state criminal proceedings.

1. Nature of Retention: The Department of Justice agrees to pay an attorney or other members of his or her firm for those legal services reasonably necessitated by the defense of a current or former federal employee (hereinafter "client") in civil, congressional, or state criminal proceedings. The Department will not honor bills for services not directly related to the defense of issues presented by such matters. Examples of services for which the Department will not pay include, but are not limited to: administrative claims against the United States on behalf of the client for any adverse monetary judgment; cross claims against co-defendants or counterclaims against plaintiff; suits against the United States under the Freedom of Information or Privacy Acts to secure documents for use in the defense of the client; and certain administrative expenses noted in numbered paragraph 4, below. The retained attorney is free to undertake such actions, but any charges must be negotiated with the client and may not be passed on to the Department. In order to avoid confusion over whether a particular service may be billed to the Department under this retention agreement, it is recommended that before undertaking the service, consultation be undertaken with the Justice Department officer mentioned in the last paragraph of the accompanying letter.

2. Billable Hours: The Department of Justice agrees to pay the retained attorney for any amount of time not exceeding 120 billable hours per month for services performed in the defense of the client. The retained attorney may utilize the services of any number of attorneys, paralegals, or legal assistants in his or her firm so long as the aggregate number of billable hours in any given month does not exceed 120 hours. The client is free, however, to retain the attorney or members of the firm to perform work in excess of 120 hours per month so long as the excess charge is not billed to the Department of Justice. The Department will consider, however, paying for services in excess of 120 hours in any given month if the press of litigation (e.g., trial preparation) clearly necessitates the expenditure of more time. Requests for additional compensation should be made to the Department in advance of such expenditures.

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3. Legal Fees: The Department agrees to pay the retained attorney up to $75.00 per lawyer hour, plus expenses as described in paragraph 4, below. The charge for any services should not exceed the retained attorney's ordinary and customary charge for such services. This fee is based on the consideration that the retained attorney has been practicing law in excess of five years. In the event the retained attorney utilizes the services of other lawyers in his or her firm, or the services of a paralegal or legal assistant, the Department agrees to pay the following fees:

(a Lawyer with more than 5 years practicing experience:

$75.00 per lawyer hour

(b) Lawyer with 3 - 5 years of practicing experience:

$60.00 per lawyer hour

(c) Lawyer with 0 - 3 years of practicing experience:

$50.00 per lawyer hour

(d) Paralegal or legal assistant:

$30.00 per hour.

4. Expenses: While normal overhead expenses may be billed to the Department (e.g., postage, telephone tolls, travel, transcripts), unusual or exceptionally high expenses should be described, justified and cleared in advance. For example, the use of computer-assisted research or power-typing should have advance approval if it will involve a charge in excess of $250.00 in a given month. Expenses such as secretarial overtime or the purchase of books will only be authorized in exceptional situtations. Travel expenses may not include first class service or deluxe accommodations, and time spent in travel should not be billed unless it is used to accomplish tasks related to the litigation. Charges for meals not related to out-of-town travel will not be allowed. The Department will not provide compensation for client or other entertainment, nor will it pay expenses for meals incidental to overtime. Expenses that can normally be absorbed as clerical overhead, such as time spent in preparing legal bills and filing papers with the Court, will also not be paid. Expenses incurred in hiring local counsel should be enumerated by rate, hour and type of service, and the hours should be included in the 120-hour monthly maximum. The hourly rates paid to local counsel may not exceed the rates listed in paragraph 3, above.

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5. Format of Bills: Bills should be submitted on a monthly basis stating the date of each service performed, the name of the attorney or legal assistant performing the service, a brief description of the service, and the time in tenths, sixths, or quarters of an hour required to perform the service. Each bill must include your social security number or the Employer Identification Number of your firm. With regard to describing the nature of the service performed, the actual itemization should reflect, whenever possible, the specific type of litigation activity involved (e.g., "legal research" or "reading legal documents"). Before a bill will be paid, Civil Division staff attorneys with substantive knowledge of the litigation will be consulted. If the retained attorney believes that the detail of the legal bill would compromise litigation tactics if disclosed to Civil Division attorneys, those particular billing items should be listed on a separate sheet of paper with an indication of the specific concern. Such items will not be reviewed or discussed with Department of Justice attorneys having responsibility for the matter in question.

6. Billing Address: Bills should be submitted to:

Director, Office of Planning,
Budget and Evaluation
Civil Division
550 11th St. N.W.
Room 920 TODD
Washington, D.C. 20530

7. GAO Review: On a periodic basis, the retained attorney may be requested to submit copies of time sheets to the General Accounting Office (GAO) for purposes of auditing the accuracy of corresponding monthly bills, copies of which will be forwarded directly to GAO by the Department.

8. Termination: The Department of Justice reserves the right to terminate its retention agreement with the retained attorney at any time for the reasons set forth in 28 C.F.R. §50.16.

ACCEPTANCE

I agree that my retention by the Department of Justice in the matter of _____ will be in accordance with the foregoing terms and conditions and further that this written instrument represents the entire agreement between the Department of Justice and the undersigned, any past or future oral agreements notwithstanding.

Signature: _____

Date: _____

DOJ-[illegible]

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RECEIPT FOR REIMBURSEMENT OF INTEREST

The undersigned hereby acknowledges receipt of Nine Thousand, Nine Hundred, Forty-Seven 44/100 Dollars ($9,947.44) paid by Powell, Goldstein, Fr r & Murphy as reimbursement of interest for the period February through July 1984.

January 5, 1986

ANNE M. BURFORD

January 5, 1986

My Commission Expires May 31, 1989

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GENERAL RELEASE

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN, KNOW THAT EACH OF the RELEASORS (as hereafter defined), in consideration of the receipt by Anne M. Burford of a payment or payments in the aggregate amount of $198,101.26 by the United States Department of Justice, the United States Environmental Protection Agency or both of them and for other good and valuable consideration receipt of which is hereby acknowledged, releases and discharges the UNITED STATES OF AMERICA, it agencies, offices, agents, employees, officers and officials from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, accountings, trusts, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, direct or indirect, known or unknown, in law or equity, which against the said RELEASEE, the RELEASORS or the RELEASORS' successors or assigns ever had, now have or hereafter can, shall or may have for, upon, or by reason of the providing of legal services to Anne M. Burford in connection with Congressional and other governmental investigations of or charges against Anne M. Burford, the United States Environmental Protection Agency and the agents and employees thereof, or the incurring of expenses for or in connection with such legal services, from the beginning of the world to the day of the date of this RELEASE. This release and discharge shall include, without limitation, all matters described in or relating to invoices dated November 9, 1983, December 20, 1983, and February 8, 1984, from Powell, Goldstein, Frazer & Murphy to Fred F. Fielding; a Claim for Damages, Injury or Death of September 26, 1985, submitted by Anne M. Burford to William Bradford Reynolds; and a letter of September 27, 1985 from Douglas P. Bennett to William Bradford Reynolds.

It is the agreement and intent of the RELEASORS that this RELEASE shall be fully effective in all parts of the world. This RELEASE shall be governed by the laws of the UNITED STATES OF AMERICA and of the District of Columbia. It cannot be modified or terminated except by a written instrument duly executed by the party to be bound thereby.

The term RELEASORS shall collectively refer to each of the signers of this RELEASE.

Anne M. Burford
2/5/1986

Douglas P. Bennett
2/05/1986

Douglas P. Bennett
Attorney-in-Fact
For: Powell, Goldstein, Frazer & Murphy

February 5, 1986
My Commission Expires May 31, 1989

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Mr. GLICKMAN. The Department's letter responding to Chairman Rodino, his inquiry regarding the use of private counsel stated that only once has an employee or former employee, Ann Burford, been required to sign a waiver of all claims against the Government and everyone else involved in the situation which gave rise to the need for an attorney. She was required to sign this waiver in order to obtain reimbursement for her attorney's fees, nearly $200,000, as I understand the amount.

This letter indicates that no other employee has been required to sign a waiver of this type because no other employee has indicated an intent to sue the United States or its employees on any matters relating to the representation. I think that is contained in the letter.

I would like to point out that the Department's statement of conditions sent to each private attorney whom the Department compensated states that the compensation will not be paid for cost claims against co-defendants, or for suits against the United States under the Freedom of Information Act and the Privacy Act.

By its very terms, then, the statement of conditions imply that Federal employees may be litigating against other Federal employees of the United States and are not prohibited from doing so.

Now, what concerns me is that Mrs. Burford may in fact have been singled out for special and unfair treatment in that she was required to waive her right not only to sue the United States, but also other involved individuals in order to obtain reimbursement.

Now, I would like to have you answer those questions, but I would like to also point out that I see a general release here and perhaps this is standard release forms, but Mrs. Burford is required to release the United States Government in connection with the EPA from the beginning of the world to the day of the date of this release, and I think it is kind of ludicrous for her to responsible for environmental happenings that occurred 2,000 years ago, and I can't understand why that language was in the release, nor could I understand how the language that the agreement and the intent of the release shall be fully effective in all parts of the world, which implies she or the United States Government could enforce this in the Soviet Union or Afghanistan.

Now, maybe that is just boilerplate language and it just struck me as kind of cutsey to put in a release like this. But I am frankly more concerned that it looks like Mrs. Burford may have been pushed into a corner in order to recover the $200,000 that other Federal and former Federal employees were not so pushed into the same corner. I wonder if you might respond to that.

Mr. WILLARD. Well, I don't know what I can say about the drafting of the release, Mr. Chairman. I was not involved in that and I really don't know where the language came from. It does look like boilerplate language and probably came from somewhere, but I just don't know.

My experience back in private practice is that a general release is supposed to be a general release and is supposed to be worded as broadly as possible. Normally when you settle litigation or claims in anticipation in litigation you try to get as broadly a worded release as possible, because if you settle a suit you hope you are settling a suit and not buying another one.

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Mr. GLICKMAN. Well, certainly settling it from the beginning of the world is a general release. OK.

Mr. WILLARD. And I would also like to say to put this in context that certainly when other outside of the private counsel representation area, it is very common for the Government and the Civil Division to get general releases with regard to settlement of claims. That is a standard lawyer's practice in this area.

Mr. GLICKMAN. Now let's get to the issue of the way that Mrs. Burford was able to get her legal expenses required different kind of treatment for her, preferentially harmful treatment maybe that was not applied to other people.

Mr. WILLARD. Well, as I indicated, as the letter indicates, it has not generally been the experience of the Civil Division that this kind of release has been necessary in the representation program. You are correct to point out that if there is no such release, someone technically would be free to bring that kind of a lawsuit and in answer to the question of why don't you always get a release, the problem hasn't appeared to be serious previously. It is a factor that can be taken into account in deciding whether to provide representation in the first place or to pay for private counsel. That is, the extent to which someone who is requesting the representation of the reimbursement has been engaging in asserting claims and litigation against other employees.

So there is—it is not a factor that has never been considered, but——

Mr. GLICKMAN. Let me stop you for a minute. How about other people who are now being represented by private counsel in EPA investigations? Are they being required to sign this kind of release Mrs. Burford signed?

Mr. WILLARD. I don't believe so.

Mr. GLICKMAN. Why?

Mr. WILLARD. I am not aware that any of them have ever threatened to bring any lawsuits against the United States or against other Federal employees. It is my understanding that Mrs. Burford had.

Mr. GLICKMAN. It just strikes me as, you know, if the law is blind, that is, equal handed, then you should get the release from everybody or nobody, and it is an unusual fact of life to be paying somebody's legal fees that the law permits you to do that in certain circumstances, and should.

I am concerned that there is a relationship now existing between Mrs. Burford and the Government which we all know is unhealthy, but my interest has been peaked by the fact that this is an extremely unusual type of thing. I want to know if it is the kind of release you will never use again or if it is one that you felt was necessary to protect the Government and maybe some of the individuals who work for the Government from Mrs. Burford?

Mr. WILLARD. Well, I would say that part of our job is to protect not only the Government itself, but Government employees who are performing their official duty. That is the purpose of our whole representation program. When a Government employee is sued on account of acts they take in their official capacity, we provide representation including in some cases, private counsel.

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Mr. GLICKMAN. But in this case, if I may interrupt you, we not only required her to waive her right to sue the United States, but also other involved individuals. I want to know who those individuals might be?

Mr. WILLARD. Well, I think she indicated that there were various former officials that she contemplated bringing claims against.

Mr. GLICKMAN. But are these the same people that are now in litigation that you are going to pay their legal fees that you aren't going to require the release from?

Mr. WILLARD. Well, as I understand it, none of those individuals have threatened or indicated an intent to file claims against the Government or anyone else. If Mrs. Burford were to sue former Government officials on account of acts they took when they were employed by the Government, then they would be entitled to request representation under the representation program from the Justice Department. I don't think it is irrational when you settle a claim to want to settle it once and for all and not buy into a whole bunch of additional litigation, which may be expensive and burdensome.

Mr. GLICKMAN. I don't disagree with you. I am just saying that something here is not being applied across the board, and it ought to cause us to review it and look at it and find out why. That's all.

Mr. WILLARD. Well, as I think you indicated, Mr. Chairman, this is a fairly unusual case, and we have had a representation program for 10 years or longer in the Civil Division, and I have been involved in it for many years. We have hired private counsel. We have provided Government representation to many Government employees, and this kind of situation has not come up before.

Now, maybe in light of this we ought to reconsider and revise our policies and start requiring releases. But the reason this is the first time it has come up as far as I know is that the person who is asking for reimbursement was simultaneously threatening suit, was stating a possible intent to file a lawsuit, which would have required the Government to defend or pay money in litigation.

Mr. GLICKMAN. Now this release doesn't prevent other folks, including former and current employees of the Government who were involved in this case from suing Mrs. Burford for defamation of character or anything like that, does it?

Mr. WILLARD. As far as I know it doesn't and I don't know of anyone who has indicated intent.

Mr. GLICKMAN. Well, that is beside the point, Mr. Willard. The release prevents Mrs. Burford from suing them for defamation of character and these kinds of things. I mean what it looks like to me, and this lady is by no means a saint in the way that she has dealt with Federal issues, but from what I read and what I hear, there are folks in this Government who have really taken out after her, and our committee's jurisdiction, in reviewing the EPA investigation, seems to reinforce that.

I just think for the record, I ought to indicate to you my own personal perspective of this is very strange, and I think it looks like justice is not blind in this case, and I just think that needs to be said.

Mr. WILLARD. Well, Mr. Chairman, I guess I just have to reiterate that even-handed treatment means treating similarly situated

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cases alike, not treating differently situated cases alike. As I have explained, I think the case of Mrs. Burford is different from other kinds of representation cases we have seen in the past, and therefore different treatment in that case doesn't mean injustice.

Mr. GLICKMAN. That of course implies a kind of a sterile view of the whole scenario and if one has a more jaundiced or even a more objective view of the scenario, you begin to see that there are no white knights in this whole situation. Therefore the implication from your statement was that Mrs. Burford was a bad character and everybody else was good, and I think that what you have done is that you have separated her out when maybe other people ought to be treated the same way.

Mr. WILLARD. I understand your position, Mr. Chairman. I just want to make it clear the different circumstance I was referring to there is as far as I know she is the only person in the situation who has threatened to file lawsuits against the Government and against former Government employees. I am not aware of anyone else who is threatening to do that.

Mr. GLICKMAN. The Burford investigation comes closest to paralleling the Watergate investigation of anything since I have been in Congress, and I am going to tell you right now, and it doesn't reach that magnitude, but I am going to tell you there is going to be lots of private litigation in this case, as there was in the Watergate situation. If what you are telling me is your position, I would say there is a lot of naivete in the Department. I just urge you to go back and reexamine your policy of settlement in light of that.

Thank you very much for your testimony. I appreciate it very much. We have got one more witness, Mr. Futey, Chairman of the Foreign Claims Settlement Commission.

Mr. Boucher, will you take the Chair for just a couple of moments?

Mr. BOUCHER [presiding]. Yes.

[Witness sworn.]

Mr. BOUCHER. Mr. Futey, we will be glad to hear from you.

STATEMENT OF BOHDAN A. FUTEY, CHAIRMAN, FOREIGN CLAIMS SETTLEMENT COMMISSION

Mr. FUTEY. Mr. Chairman, members of the subcommittee, I am pleased to appear before you and to report to the committee on the work of the Foreign Claims Settlement Commission, as well as the budget that is being proposed for fiscal year 1987. I will also request our prepared statement be included in the record.

Mr. BOUCHER. Without objection it will be made part of the record.

Mr. FUTEY. The Foreign Claims Settlement Commission is a small quasijudicial Federal agency which has been authorized over the years by specific legislation to determine claims of U.S. nationals for losses of property in specific foreign countries. During fiscal year 1987 the Commission will be engaged in the adjudication of claims of individuals and corporations against the Provisional Military Government of Socialist Ethiopia pursuant to a claims settlement agreement signed on December 19, 1985.

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The agreement creates a $7 million fund for the purpose of paying meritorious claims of U.S. nationals. The program will be carried out under the authority of title I of the International Claims Settlement Act of 1949, as amended. The Commission will shortly announce a 6-month period for the filing of claims and anticipates that the Commission can wind up its affairs in that program, including the conduct of all oral hearings and objections which may be filed by the end of fiscal year 1987.

During fiscal year 1987, the Commission will continue providing technical data to the Department of State to assist in its negotiations to reach a claims settlement agreement with the German Democratic Republic, if a claims settlement agreement has not been reached by then.

In the event that a lump sum settlement agreement has been reached with the GDR, the Commission will proceed under title I of the International Claims Settlement Act of 1949 to conduct a limited program to allow the determination of all claims by U.S. nationals against the GDR which may have arisen since October 18, 1976, the date Public Law 94-542 allowed the original determination of such claims.

Similar technical support and assistance will be required at such time as negotiations are commenced to seek a claims settlement with the Socialist Republic of Vietnam to provide funds for the distribution on awards made by the Commission under Public Law 96-606. Adjudications in this program determining claims against Vietnam will be completed on February 25, 1986.

In addition, the Commission each year receives thousands of inquiries from members of the public, attorneys, congressional offices and other executive departments concerning past and potential claim programs, drawing upon the knowledge and expertise of the Commission and its staff.

Pursuant to Public Law 99-33 passed in August 1985, the Commission has been directed to adjudicate some 2,600 claims of United States nationals against Iran, contingent upon entering of a settlement agreement between the United States and Iran.

Such agreement has not yet been achieved and therefore it is impossible at this time to project the time period when these claims will be adjudicated. Even without a settlement agreement, the Commission will continue in its constant contact with the Department of State in providing information and legal precedents to assist in the presentation of the claims which are presently before the United States-Iran Claims Tribunal at The Hague.

Under the authority granted by Public Law 91-289, the Commission continues, from time to time, to receive and act on applications for prisoner of war benefits based upon interment during the Vietnam conflict.

The Commission also receives numerous requests for verification of previous POW status to assist veterans in obtaining benefits based on such status.

As previously stated, at the present time the Commission is in the process of completing a program which has made almost $100,000,000 in awards to United States nationals for the expropriation of property by the Socialist Republic of Vietnam.

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In the process of obtaining compensation for American citizens, normally three separate departments of the U.S. Government become involved at some stage in the proceedings.

The role of the Foreign Claims Settlement Commission is to adjudicate the validity and amount of such claim. This requires evaluating evidence and information concerning the claim and determining the appropriate precedents under international law and applying these within the terms of the applicable authorizing statute.

If such a valid claim has been established, the Commission has the further responsibility to determine the amount of the loss so that a dollar award may be made to the claimant. The issuance of such an award, in and of itself, however, does not provide compensation to the claimant. Money to pay the awards of the Commission normally come from a lump sum claims settlement agreement with the foreign country which has confiscated the property.

Responsibility for the negotiation of such an agreement generally rests with the Department of State. After the negotiation of a claims settlement agreement, it becomes the responsibility of the Department of the Treasu y to actually distribute the proceeds of this fund to those claimants in accord with the awards which have been certified to the Department of the Treasury by the Foreign Claims Settlement Commission.

The Commission requests an authorization as part of the authorization of the Department of Justice, to continue its operation at a reduced level in the fiscal year 1987. The Commission seeks authorization of $596,000 based upon a substantial reduction in its staff.

In addition to the 3 positions occupied by the Commissioners, 2 of which serve only on a part-time basis, the Commission proposes to reduce its support staff from 12 positions to 6 positions.

To effect economies, the Commission proposes to abolish the position of General Counsel and reduce the legal staff to two attorneys. The Commission is releasing 42 percent of its present space. I would particularly ask the committee to note that the authorization sought includes $104,000 or 17.5 percent in statutory benefits, including severance pay, accrued annual leave, and unemployment insurance caused by the reductions in force which will be required to effect the Commission's new personnel levels.

I would like to call to the committee's attention the fact that the Commission is unique and its operating expenses are only partially, if at all, ultimately borne by the U.S. taxpayers.

In most instances the authorizing statutes have provided for the payment of the Commission's awards from funds obtained, either from the liquidation of foreign assets blocked in the United States or from funds obtained from foreign governments by negotiation of a claims settlement agreement.

The statutes have provided for the deduction of certain percentages from such claims funds for deposit as miscellaneous receipts in the U.S. Treasury to defray the administrative expenses of the Commission and the Department of the Treasury in carrying out the programs.

The total obligations of the Commission and its predecessors from the beginning of fiscal year 1950 through the end of fiscal year 1985 have amounted to approximately $25 million, whereas $32 million has been recouped. In this regard, the adjudication of

claims against Ethiopia during fiscal year 1987 pursuant to a $7 million lump sum settlement, will result in a further deposit as miscellaneous receipts in the U.S. Treasury of an amount of $350,000.

Thank you.

[The statement of Mr. Futey follows:]

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U.S. Department of Justice

Foreign Claims Settlement Commission
of the United States

Washington, D.C. 20579

SUMMARY OF TESTIMONY ON BEHALF OF THE
FOREIGN CLAIMS SETTLEMENT COMMISSION
BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENT RELATIONS OF THE HOUSE COMMITTEE
ON THE JUDICIARY

The Foreign Claims Settlement Commission is a small separate agency within the Department of Justice. The Commission acts as a quasi judicial body to determine the validity and amounts of claims by United States nationals against specific foreign governments, as authorized by statute.

The Commission has recently completed the investigation and determination of 1,619 claims against Czechoslovakia. During the remainder of this fiscal year, the Commission will be engaged in determining approximately 250 claims remaining out of some 534 claims filed for losses in excess of one-half billion dollars against the Socialist Republic of Vietnam.

In addition, the Commission will continue its function of advising the Congress and Executive agencies concerning past and potential claims programs and will act on any new applications for prisoner of war benefits arising out of the Vietnam conflict.

Most, if not all, of the funds appropriated for the administrative expenses of the Commission are ultimately recouped by the United States Treasury from a percentage of claims funds obtained for the payment of Commission awards.

For fiscal year 1986, the Commission seeks authorization to allow it to operate at a reduced level of activity. This will mean a reduction of two positions and three workyears for a total reduction of $50,000 from our FY 1985 budget.

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STATEMENT OF BOHDAN A. FUTEY, CHAIRMAN
OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION
BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENT RELATIONS OF THE HOUSE
COMMITTEE ON THE JUDICIARY

The Foreign Claims Settlement Commission is a small quasi judicial federal agency which has been authorized over the years by specific legislation to determine claims of United States nationals for losses of property in specific foreign countries. The present Commission was created on July 1, 1954 by Reorganization Plan No. 1 of 1954 and operated as a separate Executive agency until October 1, 1980 when the Commission was transferred by Public Law 96-209 as a separate agency within the Department of Justice.

On May 3 of last year, I was appointed Chairman of the Commission, which is a fulltime position. The Commission currently has a total of 18 positions, including myself and two part-time Commissioners, the Honorable Frank H. Conway of Massachusetts and the Honorable Joseph W. Brown of Nevada. The rest of our staff includes attorneys, secretaries and administrative personnel.

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During fiscal year 1985 and continuing through fiscal year 1986, the Commission is charged by statute with the adjudication of claims by United States citizens resulting from losses due to the confiscation of property by the Government of the Socialist Republic of Vietnam (P.L. 96-606).

The Commission has issued decisions on nearly one-half of the 534 claims filed to date. Almost all of these decisions have been denials. The Commission's staff is presently developing the remaining claims which will result in all likelihood in a number of awards. The Commission has until February 24, 1986 to complete its adjudication of the claims filed under Public Law 96-606.

The reason that the Commission is now beginning to move into the adjudication of the more complex claims for losses in Vietnam is because after the authorization for the Vietnam Claims Program, the Commission was authorized to adjudicate over 1600 claims for losses in Czechoslovakia and to redetermine 141 other claims for losses in Czechoslovakia. In view of the small number of claims for losses in Vietnam filed and the fact that the Congressional mandate for the Czechoslovakian claims would expire in February of 1985, the Commission, without any increase in its staff, decided to use all of its resources to complete the adjudication of the Czechoslovakian claims and to postpone major involvement in the Vietnam claims.

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The Commission successfully completed the Czechoslovakian claims program on February 25, 1985 and we are now turning our full attention to the adjudication of the approximately 250 claims remaining for losses of American citizens in Vietnam.

Another reason that this strategy for applying the Commission's resources was selected was that, under an agreement with the Government of Czechoslovakia, funds were made available to the Treasury Department for payment of awards granted by the Commission. At present, there are no funds available to make payments on awards granted in Vietnam claims. It was envisioned at the time of the passage of Public Law 96-606 that payments would be possible only after a negotiated claims settlement agreement was reached between the United States and Vietnam and that Vietnam would provide the funds.

The Commission has no general authority to adjudicate any international claim, even if meritorious. Rather, the Commission's authority comes from specific statutes which authorize the Commission to conduct a claims program involving all claims against a particular country. Over the course of years, the Commission has conducted programs involving claims of United States nationals against such countries as Poland, Czechoslovakia, Hungary, Rumania, Bulgaria, Yugoslavia, the German Democratic Republic, Cuba, and China. In the process of obtaining compensation for American citizens, normally three separate departments of the United States government become involved at

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some stage in the proceedings. The role of the Foreign Claims Settlement Commission is to evaluate evidence and information concerning the claim and to make a determination as to whether the claimant has established a valid claim under international law and within the terms of the authorizing statute. If such a valid claim has been established, the Commission has the further responsibility to determine the amount of the loss so that a dollar award may be made to the claimant. The issuance of such an award, in and of itself, however, does not provide compensation to the claimant. Money to pay the awards of the Commission normally come from a lump sum claims settlement agreement with the foreign country which has confiscated the property. Responsibility for the negotiation of such an agreement generally rests with the Department of State. After the negotiation of a claims settlement agreement, it becomes the responsibility of the Department of the Treasury to actually distribute the proceeds of this fund to those claimants in accord with the awards which have been certified to the Department of the Treasury by the Foreign Claims Settlement Commission.

The order in which these events occur has varied with different programs. In the case of claims against Poland, the Department of State negotiated a lump sum settlement agreement, after which the Commission adjudicated the claims. In the case of claims involving the German Democratic Republic, the Commis-

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sion completed adjudication of claims in May of 1981 and since then the Department of State has been attempting to obtain a lump sum settlement so that payments can be made to award holders.

The history of the disposition of claims against Czechoslovakia illustrates a somewhat more complex pattern to accomplish both the adjudication and compensation of claims. In 1958, the Commission was authorized by Title IV of the International Claims Settlement Act of 1949, as amended, to adjudicate claims by United States nationals against Czechoslovakia for property which had been nationalized or otherwise taken between January 1, 1945 and August 8, 1958, the date of the statute. This program was completed in 1962 and total awards of over $113 million were assessed by the Commission. As no settlement agreement had been reached by that time with Czechoslovakia, the Congress authorized the U.S. government to seize the equipment for a steel plant which had been purchased in the United States by the Government of Czechoslovakia. This equipment was then sold for approximately $8 million which was initially distributed among award holders. After years of negotiations, ultimately, a new claims agreement was reached with Czechoslovakia in 1981, in which the government of that country agreed to pay an additional $81.5 million in settlement of all claims of American nationals. The bulk of the settlement was set up in a fund to make further distribution to those claimants who already held awards from the Commission. As is apparent, however, if an individual had

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property taken after August 8, 1958, he or she had no opportunity to submit a claim to the Commission and obtain an adjudication. Therefore, pursuant to the Czechoslovakian Claims Settlement Act of 1981, Congress set aside $1.5 million from the settlement and authorized the Commission to receive claims for any losses occurring after August 8, 1958 up to February 2, 1982, the effective date of the settlement agreement between the United States and Czechoslovakia.

Most of the 1619 claims filed with the Commission in this program did not meet the statutory requirements that property must have been owned by a United States national on the date of nationalization or other taking by the Government of Czechoslovakia and that such loss must have occurred after August 8, 1958. Many of the claims submitted did not provide sufficient information to allow the Commission to determine if these conditions had been met. This was either because the claimant lacked information or because the claimant withheld information from the Commission, knowing that to provide full details would cause the claim to be denied.

Because of the Commission's efforts to obtain information from the Government of Czechoslovakia on claims, as provided for in the agreement for the settlement of claims in Czechoslovakia, and because of the Commission's own research efforts at the Library of Congress, a great many claimants, whose claims would not have been compensable based upon their submissions of

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evidence were granted awards. The total of the awards granted is a little over $5 million and the funds available, including interest accrued on the $1.5 million set aside by Congress for payment on awards under Public Law 97-127, is $2.1 million.

At the present time the only program for nationalization of American owned property being administered by the Commission is for claims of United States citizens against Vietnam. The Commission, by law, has to complete this program, in fiscal year 1986 and since February 25, 1985, the Commission's efforts have been directed solely to this program. We foresee no reason why this program should not also be successfully completed by the deadline set by Congress.

Under the authority granted by Public Law 91-289, the Commission continues, from time to time, to receive and to act on applications for prisoner of war benefits based upon internment during the Vietnam conflict.

The Commission is aware of the possibility of new claims programs with respect to the losses of U.S. nationals in Iran, Albania and the Soviet Union.

With regard to the United States nationals who are not former hostages, the agreements signed in Algiers on January 19-20, 1981 provided for the establishment of the United States-Iran Claims Tribunal to arbitrate their claims against Iran arising out of debts, contracts, expropriations, or other

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measures affecting property rights. Claims of $250,000 or more had to be submitted to the Tribunal-which is located at the Hague in the Netherlands-by the claimants themselves. The Algiers agreements stipulated that claims of less than $250,000 were to be presented to the Tribunal on behalf of United States nationals by the United States Government.

Currently, the United States Department of State is presenting the less than $250,000 claims to the Tribunal. The Commission has been advised that the administration is submitting proposed legislation which would give the Foreign Claims Settlement Commission authority to decide the under $250,000 claims of United States nationals in the event a lump sum settlement for these claims was entered into between the United States and Iran.

While the statutes have authorized claims adjudications by the Commission involving most of the countries whose postwar governments engaged in heavy expropriation of private property, the Commission is aware of a number of potential claimants who may have valid claims against the Soviet Union or Albania, two countries for which programs have not been authorized. These involve claims against the Soviet Union arising in particular in those areas in eastern Europe annexed by the Soviet Union after World War II and outstanding claims by United States citizens for nationalization of property in Albania.

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In addition to the adjudication of current claims programs, the Commission each year receives thousands of inquiries concerning past and potential claim programs and provides advice to legislative committees and other Executive departments concerning matters involving foreign claims.

The Commission requests an authorization as part of the authorization of the Department of Justice, to enable it to continue its operation at the present level as during fiscal year 1985, and at a reduced level in 1986. The reduction of $50,000 will come mainly from a decrease of two positions and a total of three workyears in Fiscal 1986.

I would like to call to the Committee's attention the fact that the Commission is unique in that its operating expenses are only partially, if at all, ultimately borne by the United States taxpayers. In most instances the authorizing statutes have provided for the payment of the Commission's awards from funds obtained, either from the liquidation of foreign assets blocked in the United States or from funds obtained from foreign governments by negotiation of a claims settlement agreement. The statutes have provided for the deduction of a certain percentage from such claims funds for deposit as miscellaneous receipts in the United States Treasury to defray the administrative expenses of the Commission and the Department of the Treasury in carrying out the programs. The total obligations of the Commission and its predecessors from the beginning of fiscal year 1950 through the end of fiscal year 1984 have amounted to approximately $24 million, whereas $31 million has been recouped.

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Mr. BOUCHER. Thank you, sir.

I notice from your testimony that you anticipating a decrease of six positions in the staff of your agency. Are those decreases occurring as a result of attrition, or are these people being terminated from the agency?

Mr. FUTEY. Most of them as a result of attrition, but also there will be a termination reduction in force.

Mr. BOUCHER. For those who are being terminated by reduction in force, do you provide coverage for life insurance, medical coverage, that sort of thing, or are they completely left on their own at the point they leave the agency?

Mr. FUTEY. I believe the benefits covered, severance benefits, accrued annual leave and unemployment insurance.

Mr. BOUCHER. Do you have any figure on what it cost the Government to provide those severance benefits?

Mr. FUTEY. I believe that for the positions that will be terminated we are talking about an amount of approximately $104,000.

Mr. BOUCHER. As compared to salaries of how much for those individuals?

Mr. FUTEY. I would like the General Counsel to answer that.

Mr. BOUCHER. Yes, we will hear from General Counsel.

Mr. ROGERS. The statutory benefits are threefold. One is severance benefits and that is based on longevity with the Government, and it is 1 week's pay at whatever rate the employee was making for each year that they have worked for the Federal Government.

Second, there is accrued annual leave, that is, any unused leave is paid off at the salary that the person was making, and then third, and this is a change that occurred several years ago the agency from its budget, must reimburse on unemployment insurance that the person may obtain if they don't get another job.

I believe the provisions at the present time are that the health insurance that the person has, I believe, continues for 1 month, or at least there is a 1-month period when the individual has the option of picking up the entire benefits on it. Life insurance provisions, well, they cease. Now, there may be, again, a month's grace period to allow the individual to pick it up.

Of course, it is contingent on what happens to the employee. If the employee leaves the Federal Government and gets a job in the private sector then the Government does not have to pick up the reimbursement for the unemployment insurance.

On the other hand, the benefits, if they are entitled, are statutory. An employee who is terminated is entitled to the severance benefits and the agency does not have the option to say, we are a little short this year, we'll pay you 80 percent of what you are entitled to, so we have to budget for it because we may have to. Now, we will do all in our effort to try to find other positions for these employees, because we will be very happy not to have to spend this and of course the employee will be very happy not to have to go on the unemployment roll.

Mr. BOUCHER. Of the six positions, how many of those six are people who are being terminated by reduction of force?

Mr. ROGERS. At the present time, three.

Mr. BOUCHER. And you are anticipating that your budgeted costs for these terminations will be about $104,000?

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Mr. FUTEY. That is correct.

Mr. BOUCHER. That is a one-time, one annual budget amount? You will not have a continuing amount?

Mr. FUTEY. That is correct, Mr. Chairman.

Mr. BOUCHER. Now, what is the annual salary of those three individuals?

Mr. FUTEY. I do not have that——

Mr. BOUCHER. Including whatever benefits.

Mr. ROGERS. I can give you the approximate salaries. One is my own, which would be $68,700 a year. One is a GS–13 attorney whose salary is roughly $45,000 a year, and one will be a, I believe, GS–5 typist, whose salary is in the $18,000 range, $15,000 to $18,000. And there are various lengths of service that those employees have obtained.

Mr. BOUCHER. What is your total staff size including these six positions?

Mr. FUTEY. At the present time?

Mr. BOUCHER. Yes.

Mr. FUTEY. There are 15 people.

Mr. BOUCHER. So you have approximately one-third in your total agency staff. Why is this reduction occurring? Is it because of required budget cutbacks or is it because of a lessened workload?

Mr. FUTEY. Well, I believe it is a combination of both. However, the main reason would be basically the reduction in the workload at the present time, and the lack of programs we are carrying out.

Mr. BOUCHER. Let's talk about that workload. You are presently handling claims against the Governments of Iran, Vietnam, and Ethiopia; is that correct?

Mr. FUTEY. At the present time we are terminating a program, finishing the program on Vietnam. That program will be terminated by February 25, next week, as a matter of fact. And after that we will be commencing a program on Ethiopia where we are proposing to start advertising for a period of 6 months to receive all the claims of United States nationals that have property expropriated by the military government in Ethiopia, and after that we will start reviewing those claims and adjudicating them.

Mr. BOUCHER. And how about the Government of Iran?

Mr. FUTEY. Last year Congress enacted legislation authorizing the Foreign Claims Settlement Commission to take over all the small claims presently pending before the United States-Iran Tribunal at The Hague. If a lump sum settlement is reached, there are approximately 2,600 such claims before the Tribunal. In the event the lump sum settlement is reached, then it will be for the Foreign Claims Settlement Commission to adjudicate. At the present time we really do not know when that will occur.

Mr. BOUCHER. Who determines whether or not such a settlement occurred? Do you negotiate directly with the Government of Iran?

Mr. FUTEY. No, we do not directly become involved in the negotiations. We advise the Department of State in many aspects of it and it is the State Department that conducts the negotiations.

Mr. BOUCHER. You had mentioned the Democratic Republic of Germany. Do you have claims processed with regard to that Government at present?

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Mr. FUTEY. We have terminated a program. We had conducted a program with GDR. At the present time, the Department of State, as well as the Ambassador to East Germany are very much involved in negotiating a lump sum settlement with East Germany. When that agreement is negotiated and comes into existence, we will be mandated by the International Claims Settlement Act of 1949 to conduct a second program on GDR from the date of termination of the first program, up to the date of the lump sum settlement agreement.

Mr. BOUCHER. So your present statutory authorizations are with respect to the claims against the Government of Vietnam, against the Government of Ethiopia, and the Government of Iran with regard to these smaller claims.

Mr. FUTEY. GDR.

Mr. BOUCHER. GDR, and is that it, just those four?

Mr. FUTEY. Plus all the claims of former prisoners of war in the Vietnam conflict.

Mr. BOUCHER. Against the Government of Vietnam?

Mr. FUTEY. Correct.

Mr. BOUCHER. Are you anticipating any other statutory authorization forthcoming against any other government?

Mr. FUTEY. It is up to Congress to pass the legislation on that.

Mr. BOUCHER. Are you aware of any being considered at the moment?

Mr. FUTEY. There are several possibilities. One is, we have been contacted by representatives of the Government of Guam over their contemplating a reparations program by the United States Government. We also are aware of several potential programs dealing with the Soviet Union and Albania. However, the status of that at the present time, we are not aware of it.

Mr. BOUCHER. In the event that Congress confers upon you jurisdiction through authorization legislation to handle claims against these additional governments, will you have the adequate staff to perform those functions or will you have to come back to the Congress and request additional money?

Mr. FUTEY. I believe that for fiscal year 1987, the workload that we have, we will be able to handle the programs as presented to you today. If anything will occur it will probably take effect in fiscal year 1988. At that time we will have ample opportunity to present a revised budget.

Mr. BOUCHER. I would agree. You would be able to do that in a revised budget.

Well, that concludes our questions. We thank you very much for appearing before us today, and the subcommittee stands adjourned.

Mr. FUTEY. Thank you very much for listening to us.

[Whereupon, at 12:05 p.m., the subcommittee adjourned subject to the call of the Chair.]

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